

2019

Does What Happens in Vegas Really Stay in Vegas?: The Potential Impact of the Las Vegas Massacre on Domestic Hotel Security and Individual Privacy Rights in Home-Like Places

Ashley J. Puchalski

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Privacy Law Commons](#)

Recommended Citation

Ashley J. Puchalski, *Does What Happens in Vegas Really Stay in Vegas?: The Potential Impact of the Las Vegas Massacre on Domestic Hotel Security and Individual Privacy Rights in Home-Like Places*, 57 Duq. L. Rev. 325 (2019).

Available at: <https://dsc.duq.edu/dlr/vol57/iss2/7>

This Student Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Does What Happens in Vegas Really Stay in Vegas?: The Potential Impact of the Las Vegas Massacre on Domestic Hotel Security and Individual Privacy Rights in Home-Like Places

Ashley J. Puchalski*

I. INTRODUCTION 326

II. FOURTH AMENDMENT PROTECTIONS OF THE HOME & HOME-LIKE PLACES..... 329

 A. *A Man is the “King” of His Own Castle* 329

 B. *Is a Man the “King” of His Own Hotel Room?* 331

III. UPPING THE ANTE: INCREASED HOTEL SECURITY IN THE WAKE OF THE LAS VEGAS MASSACRE..... 334

IV. RAISING THEIR HAND: HOW THE INTERNATIONAL HOTEL INDUSTRY HAS RESPONDED TO TERROR ATTACKS ON HOTELS ABROAD..... 335

V. FOLDING THEIR HAND: HOW THE UNITED STATES HAS RESPONDED TO DOMESTIC TERROR ATTACKS—THE PATRIOT ACT’S DEVASTATING EFFECTS ON FOURTH AMENDMENT PRIVACY RIGHTS 337

VI. ANALYSIS—PLACING MY BET: IDEAL LEGISLATION PROPOSED 340

VII. RED OR BLACK?: PLAYING ROULETTE BY RELYING ON INDIVIDUAL STATE CONSTITUTIONS FOR HEIGHTENED FOURTH AMENDMENT PROTECTIONS 346

VIII. CONCLUSION—ALL CARDS ON THE TABLE 349

* Ashley J. Puchalski is a 2019 J.D. candidate at Duquesne University School of Law. She graduated from the University of Pittsburgh, *summa cum laude*, in 2016 with a B.A. in Social Work. The author would like to thank all of the Duquesne University School of Law faculty for influencing her writing and learning, in addition to her family and friends for their constant love and support.

I. INTRODUCTION

On the night of October 1, 2017, the sound of a machine gun could be heard echoing throughout the Las Vegas Strip.¹ What should have been a fun, carefree night for country music fans attending the Route 91 Harvest Music Festival in Las Vegas, Nevada, quickly turned into a nightmare when gunman Steven Paddock smuggled firearms into his thirty-second-floor Mandalay Bay Resort & Casino hotel room, and shot into the crowd below,² killing fifty-eight people and injuring more than five hundred others.³

After the Las Vegas Massacre, a Second Amendment debate was, naturally, ignited once again on Capitol Hill,⁴ however, one aspect of the shooting's aftermath that has largely been left out of the discussion is the impact the massacre had on hotel security. Since the Las Vegas Massacre, hotels in both Las Vegas and throughout the country have begun implementing security measures to ensure the safety of hotel guests.⁵ Given the nature of the situation, many hotels' actions seem reasonable, however, these changes could potentially be devastating to individual Fourth Amendment privacy rights, as the Fourth Amendment of the United States' Constitution gives heightened protections to individuals residing in their homes or in home-like places,⁶ such as a hotel room.⁷

The sanctity of the home has long been recognized by legislatures and courts through the implementation of Fourth Amendment principles, ensuring that search warrants are obtained before searches

1. Garrett Mitchell, 'A Sound I'll Never Forget': Peoria Woman Recounts Las Vegas Shooting, STAR PRESS (Oct. 4, 2017, 3:34 PM), <https://mocux.thestarpress.com/story/news/local/peoria/2017/10/03/z-vegas-shooting-peoria-womans-harrowing-account/728502001/>.

2. Isabel Dobrin & Tanya Ballard Brown, *Las Vegas Massacre Raises Questions About Hotel Security*, NPR (Oct. 2, 2017, 3:28 PM), <http://www.npr.org/2017/10/02/555067087/las-vegas-massacre-raises-questions-about-hotel-security>.

3. *Las Vegas Shooting Updates: Deadliest Mass Shooting in Modern U.S. History*, BALT. SUN (Oct. 5, 2017, 9:45 AM), <http://www.baltimoresun.com/news/nation-world/la-las-vegas-shooting-live-updates-carnage-concert-leaves-50-dead-100-injured-20171002-htmlstory.html>.

4. Rebecca Savransky, *Dem Senator: 'How Many Lives Must Be Lost Before We Act?'*, HILL (Oct. 2, 2017, 10:06 AM), <http://thehill.com/homenews/senate/353402-dem-senator-how-many-lives-must-be-lost-before-we-act>; see also Max Greenwood, *Dem Rep Slams Moments of Silence, Urges Action After Las Vegas Shooting*, HILL (Oct. 3, 2017, 10:27 AM), <http://thehill.com/homenews/house/353597-dem-rep-slams-moments-of-silence-urges-action-after-las-vegas-shooting>.

5. Kate Taylor, *The Las Vegas Shooting Could Completely Change How Hotels Think About Security*, BUS. INSIDER (Oct. 7, 2017, 9:38 AM), <http://www.businessinsider.com/las-vegas-shooting-changes-hotel-security-2017-10>.

6. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

7. *United States v. Allen*, 106 F.3d 695, 698 (6th Cir. 1997) (citing *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *Stoner v. California*, 376 U.S. 483, 490 (1964)).

and seizures are conducted within an individual's home or home-like place.⁸ However, the horrific nature of the recent Las Vegas shooting leaves open an important question: what is next for hotel security in the United States? While there has been no congressional attempt at this point to regulate this area, if events that endanger public safety such as the Las Vegas shooting continue to occur, it is likely only a matter of time until Congress will be forced to take action. If Congress passes legislation requiring heightened security in hotels, and Congress struggles to strike an acceptable balance between individual liberties and public safety, the legislation may have the potential to relax warrant requirements, weaken individual privacy rights, and jeopardize the greater Fourth Amendment protections afforded to privacy within the home or home-like places, such as hotel rooms.

In this article, I first discuss the history of protecting privacy within the home and the Supreme Court's extension of that protection to hotel rooms. Next, I discuss the impact of the Las Vegas Massacre on hotel security in the United States, followed by a discussion of how the international hotel industry has historically responded to terrorist attacks by increasing hotel security. I then discuss the United States' response to perhaps the most well-known incident to endanger public safety in the United States: September 11, 2001. Accordingly, I demonstrate how, in the wake of that tragedy, Congress struggled to balance national security and individual liberties when it hastily passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,⁹ more commonly known as the USA PATRIOT Act (hereinafter "PATRIOT Act").¹⁰

In the analysis section of this article, I propose ideal legislative provisions for Congress to include in future legislation. While I do not propose complete legislation, I propose provisions that I believe have the potential to improve hotel security in the United States, while preserving the Fourth Amendment rights of hotel guests. The legislative provisions draw inspiration from the international hotel

8. *Kyllo*, 533 U.S. at 31; *Silverman*, 365 U.S. at 512.

9. See Andrew Glass, *Bush Signs USA PATRIOT Act into Law*, Oct. 26, 2001, POLITICO (Oct. 26, 2015, 12:03 AM), <https://www.politico.com/story/2015/10/bush-signs-usa-patriot-act-into-law-oct-26-2001-215030> (noting that President George W. Bush signed the PATRIOT Act into law on October 26, 2001, which was only forty-five days after September 11).

10. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified at 18 U.S.C. § 1).

industry, from the mistakes of Congress post-September 11, 2001, and from domestic airport security procedures.

I first suggest that Congress mandate that American hotels have security stations at each hotel entrance where security guards are professionally trained to use X-ray machines and metal detectors to screen individuals and their luggage. Next, I suggest that the legislation provide a comprehensive list of unauthorized items for hotels and hotel rooms. While I do not propose a complete list of unauthorized items, I recommend giving hotel guests leeway regarding everyday items, while certain firearms and explosives should be absolutely prohibited. I then propose that Congress mandate hotel staff members to ensure that they are properly screening guests before they enter the hotel, and are trained to recognize suspicious activity. I then propose that Congress include a provision in the legislation that explicitly states that no hotel room can be searched without probable cause, ensuring that hotel personnel do not authorize warrantless searches of hotel rooms. My final suggestion is that Congress create a governing body (a department, committee, etc.) to oversee the newly implemented processes and to ensure compliance.

Finally, I explain that, in the event that Congress passes legislation that infringes on individual Fourth Amendment privacy rights, the last line of defense for individuals will be state constitutions that offer greater Fourth Amendment protections to their citizens. Citizens of Pennsylvania, for example, may be afforded greater Fourth Amendment protections,¹¹ while citizens of Florida will not because the Florida Supreme Court has refused to broaden privacy protections beyond those afforded by the Fourth Amendment of the United States Constitution.¹² Thus, this has the potential to be problematic because it will leave some Americans turning to their respective state courts for relief, while other Americans will not be afforded the same opportunity.

11. PA. CONST. art. 1, § 8.

12. *Bernie v. State*, 524 So. 2d 988, 990-91 (Fla. 1988) (After the 1982 amendment to the Florida Constitution, Florida courts were bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment but *could not* provide greater protections than those interpretations.).

II. FOURTH AMENDMENT PROTECTIONS OF THE HOME & HOME-LIKE PLACES

A. *A Man is the “King” of His Own Castle*

What exactly constitutes a “home?” Is a home where a man lays his head at night? Must a home be a permanent place? Or can a home be temporary in nature? The Supreme Court of the United States has been called upon to answer many of the aforementioned questions over the past few decades, however, the right to privacy in the home or in home-like places has deep roots in both English and American jurisprudence.

The idea that “a man’s house is his castle”¹³ is a powerful concept that is deeply embedded in English tradition. For example, the Earl of Chatham, William Pitt, addressed the English House of Commons to discuss the danger of admitting officers into private citizens’ houses.¹⁴ Pitt eloquently demonstrated the importance of residential privacy in England:

‘The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!’¹⁵

Additionally, when the time came to form the United States of America, the founding fathers kept in mind the idea that an individual should be able to deny entry into his home to whomever he wishes.¹⁶ In fact, to ensure that residential privacy would remain a fundamental right for all American citizens, the founders codified it as the Fourth Amendment of the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

13. *Payton v. New York*, 445 U.S. 573, 598 (1980).

14. *Miller v. United States*, 357 U.S. 301, 307 (1958).

15. *Id.* (quoting William Pitt, Earl of Chatham on the occasion of a debate in Parliament).

16. The Founding Fathers placed the Fourth Amendment in the Bill of Rights. U.S. CONST. amend. IV; see also *The United States Bill of Rights: First 10 Amendments to the Constitution*, ACLU, <https://www.aclu.org/united-states-bill-rights-first-10-amendments-constitution> (last visited Apr. 9, 2019).

particularly describing the place to be searched, and the persons or things to be seized.¹⁷

While the Fourth Amendment protects the home from unreasonable searches and seizures, the Amendment's core principle allows a man the opportunity to retreat into his home and be free from unreasonable governmental intrusion.¹⁸

In *Silverman v. United States*, the District of Columbia Police Department used an amplifying device to both record and listen to the petitioners' conversations in their home after the police suspected that they were involved in illegal gambling activities.¹⁹ Accordingly, the testimony regarding those conversations was admitted at trial and played a substantial part in the petitioners' convictions.²⁰ However, the Supreme Court refused to allow the admission of evidence gathered from the recorded conversations because "the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office . . . a usurpation that was effected without their knowledge and without their consent."²¹ The Court made this decision based upon precedent, as it had never before allowed an officer who lacked a warrant or consent to enter a man's home to secretly observe and relate what was seen or heard at the individual's subsequent criminal trial.²² Additionally, the Court emphasized the fact that the intrusion was directly related to the defendant's home, stating "[t]he Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."²³

Additionally, in *Payton v. New York*,²⁴ and its companion case, *People v. Riddick*,²⁵ the Supreme Court was called upon to examine the constitutionality of two New York statutes that allowed police to enter residences without search warrants to make felony arrests.²⁶ In *Payton*, police officers went to Payton's residence without a search warrant.²⁷ When there was no answer at the door, police

17. U.S. CONST. amend. IV.

18. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

19. *Id.* at 506.

20. *Id.* at 507.

21. *Id.* at 511.

22. *Id.* at 512.

23. *Id.* at 511.

24. *Payton v. New York*, 445 U.S. 573 (1980).

25. The New York Court of Appeals consolidated *Riddick* and *Payton* and issued only one opinion. *Id.* at 579. For purposes of this article, the principles set forth by the Supreme Court in its consolidated opinion will be referred to as *Payton*.

26. *Payton*, 445 U.S. at 574.

27. *Id.* at 576.

officers broke down the door, entered the apartment, and seized evidence in plain view that was later admitted as evidence in Payton's criminal trial.²⁸ In *Riddick*, the police arrived at Riddick's house without a warrant and when Riddick's young son answered the door, the police entered the house and seized illegal narcotics after seeking Riddick inside.²⁹ Riddick was later arrested and indicted on narcotics charges.³⁰ Accordingly, the Supreme Court consolidated both of the aforementioned cases and issued one opinion.³¹

In its analysis, the Court cited its previous decision in *United States v. United States District Court for the Eastern District of Michigan*, noting that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."³² The Court also reasoned that entry into a home to search for and to seize property justify the same level of constitutional protection.³³ Further, the Court found the Second Circuit's reasoning regarding warrantless intrusions in the home to be persuasive:

To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.³⁴

The Court echoed this principle by reasoning that the Fourth Amendment "draw[s] a firm line at the entrance to the house," and "[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant."³⁵ Accordingly, the Supreme Court held that the warrantless entries in both *Payton* and *Riddick* violated the Fourth Amendment.³⁶

B. Is a Man the "King" of His Own Hotel Room?

Historically, residential privacy has been considered sacrosanct. However, whether Fourth Amendment protections extended to

28. *Id.* at 576-77.

29. *Id.* at 578.

30. *Id.*

31. *Id.* at 579.

32. *Id.* at 585-86 (quoting *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 313 (1972)).

33. *Id.* at 588.

34. *Id.* at 588-89 (quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978)).

35. *Id.* at 590.

36. *Id.* at 603.

“temporary” or “non-permanent” homes was the next logical question for the Supreme Court. As previously mentioned, the Fourth Amendment requires police officers or other governmental actors to obtain a warrant before searching or seizing “persons, houses, papers, and effects.”³⁷ While a hotel room and a permanent residence are facially different, the Supreme Court extended Fourth Amendment protections to individuals staying in hotel rooms as well.³⁸

In *Katz v. United States*, the Supreme Court held that the Fourth Amendment protects people, not places, and explained that Fourth Amendment protection depends on whether the individual seeking the constitutional protection has a legitimate expectation of privacy in the invaded place.³⁹ Accordingly, the Supreme Court has also held that a hotel room is like a home until the guest’s lease of the room expires or the guest checks out,⁴⁰ and the resident of a hotel room has the same expectation of privacy as an individual within a house.⁴¹ Further, just as an individual’s home is protected from warrantless intrusions, any lesser standard when applied to a hotel room is presumptively unreasonable.⁴²

In *United States v. Jeffers*, the Supreme Court of the United States held that the warrantless search of a hotel room was unconstitutional even though the police were granted entry by the hotel’s assistant manager.⁴³ Jeffers was convicted of violating narcotics laws after police conducted a warrantless search of the hotel room where he was staying.⁴⁴ After police suspected that Jeffers had “some stuff stashed” in his hotel room at the Dunbar Hotel, they went to his hotel room, knocked at the door, and when there was no answer, asked the hotel’s assistant manager for a key to the room.⁴⁵ The assistant manager unlocked the door and the police entered Jeffers’ hotel room, conducted a warrantless search, and subsequently discovered illegal narcotics.⁴⁶ Jeffers was later arrested and charged.⁴⁷ The Supreme Court noted that if it were to hold that

37. *United States v. Allen*, 106 F.3d 695, 698 (6th Cir. 1997) (citing U.S. CONST. amend. IV).

38. *E.g.* *Hoffa v. United States*, 385 U.S. 293, 301 (1966), *Stoner v. California*, 376 U.S. 483, 490 (1964), *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

39. *Katz v. United States*, 389 U.S. 347, 351 (1967).

40. *United States v. Young*, 573 F.3d 711, 721 (9th Cir. 2009) (citing *Jeffers*, 342 U.S. at 51-52).

41. *See Stoner*, 376 U.S. at 490.

42. *State v. Miller*, 602 N.E.2d 296, 301 (Ohio Ct. App. 1991) (citing *Middleburg Hts. v. Theiss*, 501 N.E.2d 1226, 1228-29 (Ohio Ct. App. 1985)).

43. *Jeffers*, 342 U.S. at 50-51.

44. *Id.* at 49-50.

45. *Id.*

46. *Id.* at 50.

47. *Id.*

the search and seizure in this instance were lawful, it would essentially overturn a principle designed to protect a fundamental privacy right.⁴⁸ Accordingly, the Court held that the evidence discovered during the warrantless search and seizure of Jeffer's hotel room should be suppressed.⁴⁹

Thirteen years later, in *Stoner v. California*, the Supreme Court once again suppressed evidence resulting from a warrantless search of a hotel room when the hotel's night clerk granted police officers entry to Stoner's hotel room without his consent.⁵⁰ The Pomona, California Police Department received information that Stoner may have been involved in a robbery that occurred earlier that day.⁵¹ Police officers then went to the Mayfair Hotel where Stoner was staying and without Stoner's permission or consent, the hotel night clerk unlocked his hotel room door and allowed the police to enter his room.⁵² The police subsequently conducted a warrantless search of the hotel room, and discovered evidence that linked Stoner to the robbery.⁵³ Additionally, the evidence seized from the room was used against Stoner at his criminal trial.⁵⁴ The Supreme Court noted that in this case it was Stoner's [Fourth Amendment] right at stake, "not the night clerk or the hotel's."⁵⁵ Further, the court explained that because a guest in a hotel room is entitled to protection against unreasonable searches and seizures, if the Court were to allow hotel employees to have "unfettered discretion" in entering and granting others permission to enter an individual's hotel room, it would infringe upon hotel guests' Fourth Amendment rights.⁵⁶ Thus, the Court held that the warrantless search conducted by police was unconstitutional and ordered that Stoner's conviction be set aside.⁵⁷

Based upon the aforementioned Supreme Court decisions, Fourth Amendment protections have been extended to individuals staying in hotel rooms.⁵⁸ Therefore, because hotel guests are afforded nearly the same Fourth Amendment protections that they would receive in their home, if Congress chooses to pass legislation that regulates hotel security in the United States, they must strike an

48. *Id.* at 52.

49. *Id.* at 54.

50. *Stoner v. California*, 376 U.S. 483, 484-85 (1964).

51. *Id.* at 484-85.

52. *Id.* at 485.

53. *Id.* at 485-86.

54. *Id.* at 486.

55. *Id.* at 489.

56. *Id.* at 490.

57. *Id.* at 484.

58. *E.g.* *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *Stoner*, 376 U.S. at 490; *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

acceptable balance between public safety and protecting hotel guests' Fourth Amendment rights in their hotel rooms.

III. UPPING THE ANTE: INCREASED HOTEL SECURITY IN THE WAKE OF THE LAS VEGAS MASSACRE

Unfortunately, the Las Vegas Massacre was not the first mass shooting to occur in the United States, but it is the deadliest.⁵⁹ Paddock had been a hotel guest at Mandalay Bay since September 28, 2017.⁶⁰ After police entered Paddock's hotel room, they found an "arsenal" of sixteen weapons stashed in the room.⁶¹ Police believed that Paddock was able to get the vast amount of weapons into the hotel without suspicion by putting the firearms in ten suitcases, which he transported up to his thirty-second floor hotel room in order to carry out the attack.⁶²

Accordingly, in the wake of the massacre, Mandalay Bay and other Las Vegas hotels have increased security.⁶³ Some Las Vegas hotels have started requiring guests to walk through metal detectors and put their luggage through x-ray machines.⁶⁴ These security measures appear to be warranted given the circumstances, however, hotels must be sure to avoid infringing upon hotel guests' individual privacy rights.⁶⁵ While a search of Paddock's luggage prior to check-in may have allowed Mandalay Bay personnel to discover the deadly weapons, such searches may be seen as intrusive and invasive. Additionally, experts believe that using x-ray machines and metal detectors as security measures would be virtually impossible long-term and would be burdensome to both hotel guests and personnel.⁶⁶

59. Taylor, *supra* note 5; Kieran Corcoran, *Updated: This Timeline Shows Exactly How the Las Vegas Massacre Unfolded*, BUS. INSIDER (Oct. 10, 2017 7:40 AM), <https://www.businessinsider.com/timeline-shows-exactly-how-the-las-vegas-massacre-unfolded-2017-10>.

60. Michelle Gant, *Las Vegas Shooting: Hotel Security a Concern, Expert Says Mandalay Bay Was 'Soft Target'*, FOX NEWS (Oct. 2, 2017), <https://www.foxnews.com/travel/las-vegas-shooting-hotel-security-a-concern-expert-says-mandalay-bay-was-soft-target>.

61. Lia Eustachewich & Danika Fears, *Las Vegas Shooter Had Cache of Weapons in Hotel Room*, N.Y. POST (Oct. 2, 2017, 2:01 PM), <http://nypost.com/2017/10/02/las-vegas-shooter-had-cache-of-19-weapons-in-hotel-room/>.

62. Nancy Trejos, *Hotel Security Under Scrutiny After Las Vegas Shooting*, USA TODAY (Oct. 4, 2017, 5:48 PM), <https://www.usatoday.com/story/travel/roadwarriorvoices/2017/10/04/hotel-security-under-scrutiny-after-vegas-shooting/733004001/>.

63. Taylor, *supra* note 5.

64. *Id.*

65. Dave Berman & Wayne T. Price, *Tourist Spots Increase Visible Security but Look for More Subtle Methods*, USA TODAY (Oct. 3, 2017, 8:39 PM), <https://www.usatoday.com/story/money/nation-now/2017/10/03/tourism-security/728172001/>.

66. Andy Sheehan, *Las Vegas Shooting Raises Questions About Hotel Security*, CBS PITT. (Oct. 2, 2017, 7:47 PM), <http://pittsburgh.cbslocal.com/2017/10/02/las-vegas-shooting-hotel-security/>.

Even as time passes and the Las Vegas Massacre becomes more distant, discussions surrounding the future of hotel security in the United States are inevitable. While there is currently no legislation in the United States aimed at regulating hotel security, if mass shootings, terrorist attacks, and other events that endanger public safety continue to occur, we may see a push for legislation and regulation that has the potential to infringe upon hotel guests' Fourth Amendment privacy rights.

IV. RAISING THEIR HAND: HOW THE INTERNATIONAL HOTEL INDUSTRY HAS RESPONDED TO TERROR ATTACKS ON HOTELS ABROAD

Unlike other industries, the hotel and hospitality industry is largely inconsistent when it comes to hotel security.⁶⁷ For example, while some international hotels have historically implemented invasive hotel security measures,⁶⁸ the United States has opted for less invasive, less restrictive measures.⁶⁹ American hotels rarely resort to using metal detectors and x-ray machines to ensure guests' safety, while both methods are commonly used internationally.⁷⁰ Additionally, it is becoming increasingly common for hotels in other countries to have armed guards on hotel premises, use vehicle barricades, and resort to other extreme security measures to reduce the risk of an attack.⁷¹ In contrast, such practices are unheard of in the United States.⁷²

Often, hotels are seen as "soft target[s]" and tend to be vulnerable to safety and security threats such as terrorism, natural disasters, and other crimes.⁷³ Accordingly, because hotels have become the target of more bombings and terrorist attacks abroad, invasive security screenings when hotel guests check in have become a way of life in countries such as Indonesia, Israel, and Egypt.⁷⁴ In 2003, terrorists set off a car bomb in a Marriot in Jakarta, Indonesia,

67. Paul Moxness, *The Evolution of Hotel Security*, CIPHER BRIEF (Dec. 18, 2015), <https://www.thecipherbrief.com/the-evolution-of-hotel-security>.

68. Tiffany Hsu, *Las Vegas Shooting Underscores Hotel Security Choices*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/business/hotel-security-las-vegas.html>.

69. See Kelvin Chan & David Koenig, *For Many Hotels, Terror Risks Make Tight Security Routine*, CHI. TRIB. (Oct. 3, 2017, 2:38 PM), <http://www.chicagotribune.com/business/ct-hotels-terror-risk-security-20171003-story.html>.

70. *Id.*

71. *Id.*

72. See generally Chan & Koenig, *supra* note 69.

73. Karam Mansour Ghazi, *Safety and Security Measures in Egyptian Hotels*, 4 J. HOTEL & BUS. MGMT. 1, 2 (2015).

74. Hsu, *supra* note 68.

which resulted in twelve fatalities.⁷⁵ Then, in 2009, terrorists again set off explosives in major Jakarta hotels, leaving eight people dead.⁷⁶ Since both of the aforementioned incidents, Indonesian hotels have strengthened hotel security in order to ensure guests' safety.⁷⁷

Additionally, after a 2008 terrorist attack in India that resulted in more than one-hundred fatalities, the hotel industry in that region responded accordingly.⁷⁸ Major hotel chains began using x-ray systems and explosive trace detectors in hotels across India, and the Lemon Tree Premier Hotel in New Delhi even trained employees to use facial-recognition software to identify any person who entered onto the hotel's premises.⁷⁹ Furthermore, the King David Hotel in Jerusalem⁸⁰ has taken hotel security measures to even greater extremes. Due to the ongoing Israeli-Palestinian conflict, the King David Hotel, which is a frequent destination for world leaders, "reportedly uses infrared cameras carried by balloons and robots in sewers to search for bombs."⁸¹ The hotel also has an air conditioning system that prevents the spread of poisonous gas, and has installed windows that can withstand gunfire.⁸²

As terrorist attacks on hotels abroad have become more common,⁸³ the international hotel industry has been both responsive and innovative when implementing hotel security measures after terrorist attacks. Bjorn Hanson, professor of hospitality and tourism at New York University, commented after the Las Vegas Massacre that despite the horrific nature of the Las Vegas Massacre, he did not think that metal detectors or x-ray machines would become common hotel security measures in United States hotels.⁸⁴ Rather, he believed more hotels would simply begin using security cameras and would become more sensitive to guests who checked in with large packages.⁸⁵ While it may be premature to suggest that the United States adopt the extreme security measures used by international hotels, there may come a time when Congress will be

75. Chan & Koenig, *supra* note 69.

76. *Id.*

77. *Id.* (Indonesian hotels have strengthened hotel security by inspecting vehicles, scanning luggage with x-ray machines, and installing more security cameras.).

78. Hsu, *supra* note 68.

79. *Id.*

80. Chan & Koenig, *supra* note 69.

81. *Id.*

82. *Id.*

83. In the six-year period from 2003-2009, there were at least three high-profile terrorist attacks on hotels abroad. See Chan & Koenig, *supra* note 69; Hsu, *supra* note 68.

84. Chan & Koenig, *supra* note 69.

85. *Id.*

forced to look to the international hotel industry for guidance when drafting legislation to regulate hotel security in America's hospitality industry.

V. FOLDING THEIR HAND: HOW THE UNITED STATES HAS RESPONDED TO DOMESTIC TERROR ATTACKS—THE PATRIOT ACT'S DEVASTATING EFFECTS ON FOURTH AMENDMENT PRIVACY RIGHTS

Historically, there has been a balancing act in our society between individual privacy rights and public safety.⁸⁶ After incidents that jeopardize public safety, the Fourth Amendment is more likely to yield to legislation that puts individual Fourth Amendment privacy rights at-risk. Perhaps the best example of the aforementioned principle is the September 11, 2001 terrorist attacks and the subsequent enactment of the PATRIOT Act.⁸⁷

On September 11, 2001, four United States commercial planes were hijacked by nineteen members of the al Qaeda terrorist group led by the now-deceased al Qaeda leader, Osama bin Ladin.⁸⁸ Two of the hijacked planes crashed into the north and south towers of the World Trade Center in New York City, another plane crashed into the Pentagon in Washington D.C., and a fourth plane crashed in a field near Shanksville, Pennsylvania.⁸⁹ While the devastating events of September 11, 2001, resulted in 2,977 fatalities,⁹⁰ the tragedy left America in shock and demanding answers, as it became apparent that America was not unsusceptible to foreign terrorist attacks.

The events of September 11, 2001 left Americans and politicians alike asking questions about the effectiveness of the country's counterterrorism efforts. Accordingly, Congress acted swiftly and introduced the PATRIOT Act.⁹¹ On October 26, 2001, President George

86. See *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 314-15 (1972) (noting that "the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression").

87. PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified at 18 U.S.C. § 1).

88. *September 11th Terror Attacks Fast Facts*, CNN (Sept. 3, 2018, 10:08 PM), <https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html>.

89. *Id.*

90. *Id.*

91. PATRIOT Act of 2001, 115 Stat. 272; see also Peter Baker, *In Debate Over Patriot Act, Lawmakers Weigh Risks vs. Liberty*, N.Y. TIMES (June 1, 2015), <https://www.nytimes.com/2015/06/02/us/politics/in-debate-over-patriot-act-lawmakers-weigh-risks-vs-liberty.html> (noting that only one senator voted against the PATRIOT Act, as they felt that the Act was a violation of civil liberties).

W. Bush signed the Act into law.⁹² On its face, the PATRIOT Act simply appeared to provide law enforcement with the necessary tools to prevent future terrorist attacks from occurring on American soil.⁹³ However, the PATRIOT Act ended up being the first of many changes to surveillance laws that allowed the U.S. government to intrude upon the civil liberties of ordinary Americans by expanding the government's authority to monitor phone calls, e-mails, bank records, credit reports, and individual internet activity.⁹⁴ The PATRIOT Act also allowed law enforcement to "better observe the conduct of individuals through sophisticated surveillance devices, including monitoring, tracking, searching a suspect's computer movements, and eavesdropping on communications with other computer users."⁹⁵ Therefore, while the PATRIOT Act was enacted in order to prevent future terrorist attacks, it also had the effect of eroding civil liberties afforded to American citizens by the United States Constitution.

In contrast to the haste in which the PATRIOT Act was passed, Congress extensively deliberated over the PATRIOT Act's predecessor, the Foreign Intelligence Surveillance Act (hereinafter "FISA").⁹⁶ In 1978, Congress enacted FISA to "provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes."⁹⁷ While Congress rushed to pass the PATRIOT Act post-September 11, 2001,⁹⁸ Congress extensively deliberated before passing FISA.⁹⁹ When deciding how much authority should be given to national security surveillance, Congress strived to achieve an adequate balance between national security and civil liberties.¹⁰⁰ Accordingly, FISA's legislative provisions were much more protective of individual privacy rights than those in the PATRIOT Act, as the PATRIOT

92. Glass, *supra* note 9.

93. Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 1, 2 (2002).

94. *Surveillance Under the Patriot Act*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act> (last visited Jan. 11, 2018).

95. Gross, *supra* note 93, at 1-2.

96. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 107-56 (codified at 50 U.S.C. § 1801).

97. See David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 487 (2006) (quoting S. REP. NO. 95-701, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3977).

98. *Surveillance Under the Patriot Act*, *supra* note 94.

99. Kelly R. Cusick, *Thwarting Ideological Terrorism: Are We Brave Enough to Maintain Civil Liberties in the Face of Terrorist Induced Trauma?*, 35 CASE W. RES. J. INT'L L. 55, 58 (2003).

100. *Id.*

Act expanded FISA by authorizing more intrusive procedures to ensure national security.¹⁰¹ For example, the PATRIOT Act expanded FISA by authorizing roving wiretaps, orders to obtain “any tangible things” without requiring individual suspicion, and warrantless wiretaps when the primary purpose is for criminal investigation.¹⁰² Perhaps instead of hastily passing the PATRIOT Act a mere forty-five days after the September 11, 2001 terrorist attacks,¹⁰³ Congress could have taken more time to consider how to achieve balance between adequate protection and civil liberties, as they did when passing FISA nearly three decades earlier.

Keeping the Fourth Amendment in mind, Congress had an obligation to balance individual citizens’ Fourth Amendment rights with national security. Unfortunately, when faced with this task, Congress struggled to strike an acceptable balance,¹⁰⁴ and innocent Americans have been forced to pay the price. Overall, the American public has never supported the government monitoring personal phone calls or emails.¹⁰⁵ In fact, a survey conducted on the tenth anniversary of the September 11, 2001 terrorist attacks indicated that only 29% of Americans who were surveyed favored “the U.S. government monitoring personal telephone calls and emails” in order to curb terrorism, and that particular question drew less support than the other anti-terror tactics asked about in the same survey.¹⁰⁶ Additionally, when it came to civil liberties, fewer Americans thought it was necessary to sacrifice civil liberties in order to combat terrorism than they did immediately after the September 11, 2001 terrorist attacks.¹⁰⁷ In a study conducted immediately after September 11, 2001, but before the enactment of the PATRIOT Act, 55% of individuals surveyed thought it was necessary for Americans to give up civil liberties in order to ensure national security, while 35% of those surveyed believed it was not.¹⁰⁸ To the contrary,

101. Jeremy C. Smith, *The USA PATRIOT Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 N.C. L. REV. 412, 417 (2003).

102. *Id.* (The following provisions of FISA were expanded upon by the Patriot Act: 50 U.S.C. §1805(c)(2)(B); 50 U.S.C. §§1861-1862; 50 U.S.C. §1804(a)(7)(B)).

103. *Surveillance Under the Patriot Act*, *supra* note 94.

104. Cusick, *supra* note 99, at 56.

105. Carroll Doherty, *Balancing Act: National Security and Civil Liberties in Post-9/11 Era*, PEW RES. CTR. (June 7, 2013), <http://www.pewresearch.org/fact-tank/2013/06/07/balancing-act-national-security-and-civil-liberties-in-post-911-era/>.

106. *Id.* (other anti-terror tactics that were surveyed include: requiring all citizens to carry a national identification card at all times, requiring extra airport checks for individuals who appear to be of Middle-Eastern descent, and government monitoring of credit card purchases.).

107. *Id.*

108. *Id.*

in a poll conducted shortly before the tenth anniversary of September 11, 2001, 40% of individuals surveyed believed that “in order to curb terrorism in this country it will be necessary for the average person to give up some civil liberties,” while the majority of individuals surveyed, 54%, said it would not.¹⁰⁹ Moreover, the statistics overwhelmingly indicate that, while Americans are concerned about national security, they disfavor government action that is considered intrusive and fails to preserve civil liberties.¹¹⁰

Rather than learning from past legislative mistakes, conflict between the government’s right to protect national security and citizens’ right to privacy continues to frustrate the legal system.¹¹¹ Similar to what occurred in the aftermath of September 11, 2001, if American hotels continue to be soft targets for terrorist attacks, Congress will likely be pressured to pass legislation that strengthens hotel security in order to preserve national security. When, and if, Congress finds itself in this predicament, Congress’s solution should keep the founding fathers’ vision in mind and strike an acceptable balance between Fourth Amendment rights and public safety.

VI. ANALYSIS—PLACING MY BET: IDEAL LEGISLATION PROPOSED

There is no denying that the Las Vegas Massacre was the most devastating shooting in modern-day U.S. history.¹¹² While the tragedy left America mourning the fifty-eight lives lost that October night, it also raised some red flags when it comes to gun control and hotel security.¹¹³ Although members of Congress chose to ignore the inadequacy of hotel security measures in the wake of the massacre,¹¹⁴ if hotels continue to be soft targets for terrorist attacks, there may come a time when lawmakers will be forced to pass legislation that regulates hotel security in the United States.

Ideal legislative provisions would take into account both the need to protect hotel guests and the need to preserve individual liberties, particularly hotel guests’ Fourth Amendment rights while staying in hotel rooms. Because Congress missed the mark when drafting

109. *Id.*

110. *See generally id.*

111. J. Alexandra Bruce, *Is Uncle Sam Stalking You? Abandoning Warrantless Electronic Surveillance to Preclude Intrusive Government Searches*, 6 J. L. & CYBER WARFARE 51, 53 (2017).

112. Taylor, *supra* note 5.

113. *Id.*

114. *See generally* Greenwood, *supra* note 4; Savransky, *supra* note 4. Both of these sources demonstrate that in the wake of the massacre, Capitol Hill was primarily concerned about gun control issues and was virtually silent on the topic of hotel security.

the PATRIOT Act post-September 11, 2001,¹¹⁵ I propose legislative provisions for Congress to include in future legislation. Accordingly, the suggested provisions take inspiration from the international 21hotel industry, from Congress' mistakes post-September 11, 2001, and from domestic airport security procedures.

While convenience is certainly important to American travelers, public safety, and national security, individual liberties should be the main factors that Congress considers when drafting legislation that regulates hotel security. Accordingly, these factors will also drive my analysis. The first provision that Congress should include in future legislation is the implementation of security stations at each hotel entrance. Ideally, these security stations will employ professionally trained security guards and use x-ray machines and metal detectors to screen individuals and their luggage. Congress should take inspiration for the security stations from the international hotel industry, as it is common practice for international hotels to have similar checkpoints where guests and their bags are screened before entering the hotel.¹¹⁶ While acknowledging the fact that this process may be seen as intrusive, burdensome, and may make traveling less convenient for Americans, more importantly, the security procedures would increase public safety and likely lower the risk of warrantless entry into guests' hotel rooms because guests will be screened immediately after they enter the hotel.

Experts, however, believe that using x-ray machines and metal detectors as security measures would be virtually impossible long-term and would be burdensome to both hotel guests and personnel.¹¹⁷ Jim Stover, a senior vice president of the real estate and hospitality practice at Arthur J. Gallagher & Company, noted after the Las Vegas Massacre that explosive scanners and x-ray machines would likely not be adopted by American hotels due to privacy concerns.¹¹⁸ However, while experts believe that having x-ray machines and metal detectors in hotels would be too burdensome for hotel guests, it is important to acknowledge that the United States implemented similar security measures in airports after

115. PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified at 18 U.S.C. § 1).

116. *See generally* Chan & Koenig, *supra* note 69.

117. Sheehan, *supra* note 66.

118. *Hotels Take New Look at Security After Las Vegas, but Will Customers Sacrifice Privacy?*, FOX NEWS (Oct. 3, 2017), <http://www.foxnews.com/us/2017/10/03/hotels-take-new-look-at-security-after-las-vegas-but-will-customers-sacrifice-privacy.html>.

September 11, 2001, and American travelers have acclimated accordingly.¹¹⁹

After September 11, 2001, Congress swiftly federalized domestic airport security by enacting the Aviation and Transportation Security Act (hereinafter “ATSA”).¹²⁰ ATSA initiated a “fundamental change in the way [the U.S. government] approaches the task of ensuring the safety and security of the civil air transportation system,”¹²¹ and transferred control of airport security to the Transportation Security Administration (hereinafter “the TSA”).¹²² Before September 11, 2001, airport security measures were much more relaxed; however, over the past seventeen years, more innovative and intrusive technology has been used to screen airline passengers.¹²³ Perhaps the most advanced and the most controversial is the full-body scanning machine that the TSA uses to detect weapons and explosives on individuals.¹²⁴ While these full body scanning machines initially incited criticism from travelers who were concerned about their privacy,¹²⁵ the machines are still being used in airports today.¹²⁶ Further, the TSA has increasingly restricted passengers from bringing particular weapons and even everyday items aboard an airplane. Prior to 2001, blades up to four inches long were allowed aboard a plane, in addition to baseball bats, box cutters, darts, and scissors.¹²⁷ Consequently, many of these items were banned from flights in the aftermath of September 11, 2001.¹²⁸ Despite the aforementioned restrictions, however, Americans still choose air travel as a primary method of transportation.¹²⁹

119. See Tobias W. Mock, *The TSA's New X-ray Vision: The Fourth Amendment Implications of "Body-Scan" Searches at Domestic Airport Security Checkpoints*, 49 SANTA CLARA L. REV. 213, 215 (2009).

120. Aviation and Transportation Security Act, Pub. L. No. 107-71 (codified at 49 U.S.C. § 40101); see also Mock, *supra* note 119.

121. Mock, *supra* note 119.

122. *Id.*

123. See generally Andrea Leinfelder, *Post-9/11 Airport Security Evolves, As Do the Threats*, HOUSTON CHRON. (Sept. 10, 2016, 12:01 AM), <https://www.houstonchronicle.com/business/article/Post-9-11-airport-security-evolves-as-do-the-9212927.php>.

124. *Id.*

125. *Id.*

126. Kathleen Crislip, *Airport TSA Backscatter or Body Scanning Machines*, TRIPSAVVY (Jan. 17, 2019), <https://www.tripsavvy.com/tsa-backscatter-or-body-imaging-x-ray-machines-3150258>.

127. Lydia O'Connor, *This Is What it Was Like to Go to the Airport Before 9/11*, HUFFINGTON POST (Sept. 11, 2016, 2:36 PM), https://www.huffingtonpost.com/entry/airports-before-911_us_57c85e17e4b078581f11a133.

128. *Id.*

129. See generally *Air Traffic by the Numbers*, FED. AVIATION ADMIN., https://www.faa.gov/air_traffic/by_the_numbers/ (last updated Nov. 26, 2018, 11:02 AM).

The next legislative provision I suggest is that Congress draft a comprehensive list of unauthorized items for hotel guests. This list should be included in the actual piece of legislation, each hotel should be mandated to publish the list on their website, and hotel guests ideally should be required to sign a waiver before booking their room(s), which would prompt the guest to agree to the initial security screening and not to bring unauthorized items onto hotel premises. While I do not propose a complete list of unauthorized items in this article, I will provide suggestions and guidelines for Congress.

First, Congress should use the TSA's list of unauthorized items and modify it accordingly.¹³⁰ When drafting legislation, Congress should also keep in mind that individuals who are traveling may choose to drive rather than fly because they prefer to travel with items that may be prohibited on airplanes. Accordingly, the list of unauthorized items on hotel premises should be less restrictive than TSA's unauthorized items. Ideally, hotel guests would be permitted to bring everyday items with them to hotels that may be prohibited on airplanes (i.e. full-sized toiletries, small scissors, aerosol cans, Swiss army knives, pepper spray and other self-defense sprays, etc.). Additionally, because hotels are considered temporary homes for guest staying for long durations, creating a flexible list of authorized items for hotel guests is appropriate.

However, while hotel guests should have more flexibility bringing everyday items into the hotel, guests should be required to follow appropriate check-in procedures for firearms and explosives that Congress may choose to permit on hotel premises. Ideally, the legislation would require that these objects be kept in an authorized area under hotel personnel supervision until the guest either checks out the item (and immediately exits the premises), or the guest completes his or her stay. Further, based on the TSA's authorized and unauthorized items list,¹³¹ items guests should be allowed to bring into hotels (as long as the guest complies with proper check-in procedures and the items are subsequently placed into an authorized area on hotel premises) are: axes/hatchets, BB guns, billy clubs, bows and arrows, box cutters, brass knuckles, firearms, flare guns, ice picks, martial arts weapons, meat cleavers, nail guns, parts of guns and firearms, pellet guns, rifles, screwdrivers/tools, stun gun/shocking devices, and swords.¹³² Additionally, guests should be

130. See *What Can I Bring?*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening/whatcanibring/all> (last visited Feb. 5, 2018).

131. *Id.*

132. *Id.*

absolutely prohibited from bringing the following items: blasting caps, dynamite, firecrackers, fireworks, gas torches, gasoline, gun powder, hand grenades, realistic replicas of explosives, realistic replicas of firearms, and sparklers.¹³³ When it comes time for Congress to draft comprehensive lists of unauthorized objects, because hotels are considered temporary homes for some guests who may stay for long durations, it will be important for Congress to be more flexible when determining what items guests are permitted and prohibited on hotel premises.

Further, in order to ensure that none of the aforementioned items brought by hotel guests will be used to carry out an attack, it is absolutely imperative that hotels employ properly trained hotel personnel and security guards. My next suggested provision urges Congress to mandate that hotel personnel complete safety training(s) and get specific certifications to ensure that hotel staff members are properly checking in and storing the authorized items. Hotel staff members should also be trained to recognize suspicious activity. In fact, Mac Segal, head of hotel security consulting for the global security firm AS Solution, maintained that the best way to prevent future terror attacks is by having a well-trained hotel staff, and noted that “every hotel employee, from housekeeping to blackjack dealers” should be trained to recognize “suspicious indicators” of an attack.¹³⁴ Additionally, transport security officers in airports go through extensive training and testing.¹³⁵ In fact, transport security officers must complete a minimum of forty hours of classroom training and sixty hours of on-the-job training to become a certified transport security officer.¹³⁶ These security officers also must pass a “standard operating procedures knowledge test, an image certification test, and a practical skills demonstration” annually to become recertified.¹³⁷ While I do not propose training requirements for each hotel employee and security guard, Congress should consult with experts from the international and domestic hospitality industry and look to the TSA’s requirements for transportation security officers when determining what certification standards are appropriate for hotel staff members.

Next, I propose that Congress include a special provision in the legislation that explicitly states that no hotel room can be searched

133. *Id.*

134. Dave Roos, *Hotels Security Experts Warn About Learning the Wrong Lessons in Wake of Las Vegas Shooting*, HOWSTUFFWORKS (Oct. 13, 2017), <https://people.howstuffworks.com/hotel-security-experts-warn-wrong-lessons-in-wake-las-vegas-shooting.htm>.

135. See Mock, *supra* note 119, at 216-17.

136. *Id.*

137. *Id.* at 217.

without probable cause. While limiting the dangerous items that can be brought on the hotel premises and mandating that hotels have security stations at each entrance, the probability of dangerous contraband making it into a guest's hotel room will likely be significantly reduced, however, because hotel rooms have granted the same Fourth Amendment protections as a home,¹³⁸ the provision would ensure that hotels will not take advantage of newly implemented security measures and allow police to conduct warrantless searches of hotel rooms.

Further, if Congress passes legislation that regulates hotel security, in order for it to be effective, it is imperative that all American hotels comply with the potential legislation. This will most likely require Congress to create a governing body, like a department or committee, to oversee the newly implemented processes and ensure compliance. It is best for Congress to create universal hotel security standards/procedures and subsequently mandate that hotels comply with those standards rather than leaving it to the courts to decide when hotels have failed to comply or leaving it for guests to decide which hotels they would like to stay at based on the intrusivity of their security measures. Congress has the time and resources to create a comprehensive piece of legislation that considers all competing issues, while courts and individual hotels do not have the same resources at their disposal. Further, it is necessary for Congress to create and implement the legislation in order to prevent economic advantage or disadvantage to particular hotels. For example, if the decision is left up to individual hotels to decide whether they want to increase security measures, a hotel that implements security procedures may be economically disadvantaged compared to a hotel that does not, as travelers may opt to stay at the hotel where they would not have to be subjected to security screenings. On the other hand, a hotel that implements security procedures may have an economic advantage compared to a hotel that does not, as travelers may opt to stay at the hotel where they feel safer and more protected. Therefore, in order to create effective legislation that evens the playing field for hotels, Congress should be the lawmaking body to create the legislation, while a committee or department, also created by Congress, would carry out Congress' objectives and ensure that all American hotels comply with the new legislation.

138. *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *Stoner v. California*, 376 U.S. 483, 490 (1964); *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

VII. RED OR BLACK?: PLAYING ROULETTE BY RELYING ON
INDIVIDUAL STATE CONSTITUTIONS FOR HEIGHTENED FOURTH
AMENDMENT PROTECTIONS

The Fourth Amendment of the United States Constitution is a constitutional floor, rather than a ceiling, and states are free to provide their citizens with protections broader than those guaranteed by the Fourth Amendment.¹³⁹ If Congress passes legislation that increases hotel security measures while simultaneously infringing upon Fourth Amendment privacy rights, individuals may rely on their state constitutions as a last line of defense. This is not an ideal solution, however, as citizens of some states may be afforded greater Fourth Amendment protections than others. For example, while Pennsylvania citizens would be able to take advantage of the greater Fourth Amendment protections afforded by their respective state constitution,¹⁴⁰ Florida citizens would be unable to do so, as Florida's constitution offers no additional privacy protections beyond those included in the Fourth Amendment.¹⁴¹

The Pennsylvania Constitution, more specifically the Fourth Amendment, has often been found to be more protective of individual rights and liberties than the U.S. Constitution.¹⁴² Shockingly, when the U.S. Constitution was adopted, there was no provision that protected citizens from searches and seizures.¹⁴³ In fact, when the Bill of Rights in the United States Constitution was being drafted, it was modeled in part from the Declarations of Rights in the Pennsylvania Constitution, particularly in regard to the warrantless searches and seizures provision.¹⁴⁴

Further, Pennsylvania's constitution, enacted in 1776, is one of the oldest state constitutions and has remained essentially unchanged, especially with regards to its criminal procedure provisions, since then.¹⁴⁵ For example, in *Commonwealth v. Sell*, the

139. Marjorie A. Shields, Annotation, *Fourth Amendment Protections, and Equivalent State Constitutional Protections, as Applied to the Use of GPS Technology, Transponder, or the Like, to Monitor Location and Movement of Motor Vehicle, Aircraft, or Watercraft*, 5 A.L.R. 6th 385 (2005) (noting that "[s]tate constitutional provisions also provide commensurate protections, and some states provide protections which have been held to be broader than those imposed by the Fourth Amendment").

140. See PA. CONST. art. 1, § 8.

141. FLA. CONST. art. 1, § 12 (amended 1982).

142. See *Commonwealth v. Waltson*, 724 A.2d 289, 293 (Pa. 1998).

143. Lindsay J. Gus, *The Forgotten Residents: Defining the Fourth Amendment "House" to the Detriment of the Homeless*, 2016 U. CHI. LEGAL F. 769, 773 (2016).

144. *Commonwealth v. Edmonds*, 586 A.2d 887, 896 (Pa. 1991).

145. Francis Barry McCarthy, *Counterfeit Interpretations of State Constitutions in Criminal Procedure*, 58 SYRACUSE L. REV. 79, 80-81 (2007).

Pennsylvania Supreme Court discussed how the Pennsylvania Constitution has historically protected individual privacy rights: “[S]urvival of the language now employed in Article I, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.”¹⁴⁶ Accordingly, the original version of Pennsylvania’s search and seizure provision read:

The people have a right to hold themselves, their houses, papers and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right and ought not be granted.¹⁴⁷

Today, Pennsylvania’s search and seizure provision is codified in Article I, Section 8 of the Pennsylvania Constitution, and reads:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.¹⁴⁸

Additionally, while Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution are nearly identical, the Pennsylvania Supreme Court has previously decided that Article I, Section 8 provides “different, greater, or more heightened protection than that of the Fourth Amendment.”¹⁴⁹ Thus, a citizen of Pennsylvania may be able to seek relief in state court if Congress passes intrusive legislation

146. *Edmonds*, 586 A.2d at 897 (quoting *Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983)).

147. *Id.* at 896-97 (This constitutional provision was reworded when the Pennsylvania Constitution was extensively revised in 1790, and reappeared as PA. CONST. art. 1, § 8.).

148. PA. CONST. art. 1, § 8.

149. *McCarthy*, *supra* note 145, at 88; *see also* *Commonwealth v. Hughes*, 836 A.2d 893, 902 (Pa. 2003) (noting that “[w]hen examining the text of Article I, Section 8, this Court has repeatedly stated that this constitutional provision embodies a strong notion of privacy, and has held that the section often provides greater protection than the Fourth Amendment to the United States Constitution”).

that regulates hotel security and infringes on Fourth Amendment privacy rights at the same time.

Conversely, the Florida Constitution offers citizens less Fourth Amendment protections than the Pennsylvania Constitution.¹⁵⁰ The 1982 amendment to Article I, Section 12 of the Florida Constitution mandated that Florida courts follow the United States Supreme Court's interpretation of the Fourth Amendment.¹⁵¹ Accordingly, Article I, Section 12 of the Florida Constitution reads:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.¹⁵²

Prior to passage of the 1982 amendment, Florida courts "were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the [F]ederal [C]onstitution."¹⁵³ After the 1982 amendment, however, Florida courts were bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment but *could not* provide greater protections than those interpretations.¹⁵⁴

Thus, if Congress passes legislation that regulates hotel security while simultaneously intruding upon individual Fourth Amendment liberties, citizens hoping to protect their Fourth Amendment rights would first have to determine where their state constitution falls on the spectrum of constitutional protections. Accordingly, a Florida citizen seeking Fourth Amendment protection from the

150. Compare FLA. CONST. art. 1, § 12 (amended 1982), with PA. CONST. art. 1, § 8.

151. FLA. CONST. art. 1, § 12 (amended 1982).

152. *Id.*

153. *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983).

154. *Bernie v. State*, 524 So. 2d 988, 990-91 (Fla. 1988).

Florida Constitution may face greater challenges than a similarly situated Pennsylvania citizen who can rely on the Pennsylvania Constitution for relief. To avoid this confusion, Congress should strive to pass legislation that balances both the need to ensure public safety and the constitutional obligation to preserve Fourth Amendment privacy rights of Americans.

VIII. CONCLUSION—ALL CARDS ON THE TABLE

In the aftermath of the Las Vegas Massacre, instead of shifting legislative focus toward the inadequacy of hotel security in United States hotels, a Second Amendment debate ignited on Capitol Hill once again.¹⁵⁵ While Congress may have turned a blind eye this time, if hotels continue to be popular targets for gun violence and terrorist attacks, hard discussions regarding increased hotel security measures are likely inevitable on Capitol Hill. If and when the time comes to draft legislation with respect to hotel security, Congress will be faced with the task of balancing public safety and the Fourth Amendment rights of citizens. However, this task is not to be taken lightly, as the right to privacy in one's home is both fundamental and sacrosanct,¹⁵⁶ and the Supreme Court of the United States has extended those same Fourth Amendment protections to hotel rooms.¹⁵⁷

When drafting legislation that increases hotel security in American hotels, ideal legislative provisions would take into account both the need to protect hotel guests and the need to preserve individual liberties, particularly hotel guests' Fourth Amendment rights while staying in hotel rooms. As Professor Erwin Chemerinsky, a constitutional law scholar and the Dean of Berkeley School of Law stated,¹⁵⁸ "[s]ome loss of freedom may be necessary to ensure security; but not every sacrifice of liberty is warranted . . . The central question must be what rights need to be sacrificed, under what circumstances, and for what gain."¹⁵⁹ While I cannot predict the future, one can only hope that if Congress passes legislation regulating hotel security, they will preserve the integrity of the Fourth Amendment of the United States Constitution, honor the wishes of

155. Savransky, *supra* note 4.

156. See U.S. CONST. amend. IV.

157. *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *Stoner v. California*, 376 U.S. 483, 490 (1964); *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

158. Susan Gluss, *Erwin Chemerinsky is New Dean of Berkeley Law*, BERKELEY L. (May 17, 2017), <https://www.law.berkeley.edu/article/erwin-chemerinsky-new-dean-berkeley-law/>.

159. Cusick, *supra* note 99, at 56.

the founding fathers, and ensure hotel guests' privacy in their hotel rooms.¹⁶⁰

160. Since the Las Vegas Massacre, more than 2,500 lawsuits have been filed against MGM Resorts International, the parent company that owns Mandalay Bay Hotel and Casino in Las Vegas, Nevada, claiming that MGM is responsible for "deaths, injuries, and emotional distress resulting" from the Massacre. Joshua Barajas, *MGM's Lawsuit Against Shooting Victims, Explained*, PBS (July 18, 2018, 9:20 PM), <https://www.pbs.org/newshour/nation/mgms-lawsuit-against-las-vegas-shooting-victims-explained>. On July 13, 2018, MGM Resorts filed a lawsuit against victims of the Las Vegas Massacre, claiming that they have "no liability of any kind" to the shooting victims because security services for the Route 91 Harvest Music Festival were provided by Contemporary Services Corporation, a security company that is certified by the Department of Homeland Security. *Id.* Accordingly, MGM argued that because it employed Contemporary Services Corporation for the music festival, MGM is granted protection under the 2002 Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act, which limits a company's liability in claims that follow a terror attack, so long as that company used services certified by Homeland Security. *Id.* MGM's spokesperson argued that the Department of Justice's Crime Victims' Fund, which has more than \$12 billion dollars in funding, should award money to the victims of the Las Vegas Massacre, as it did for victims of the Boston Marathon bombing in 2013. Elliott Mest, *Why MGM Resorts Wants Its Day in Federal Court*, HOTEL MGMT. (Sept. 5, 2018, 5:53 PM), <https://www.hotelmanagement.net/legal/why-mgm-resorts-wants-its-day-federal-court>. However, the Las Vegas Massacre has yet to be ruled as an act of terrorism. *Id.* In fact, Jim Connors, attorney at law firm Marshall Dennehey Warner Coleman & Goggin, said that "the act is notoriously vague in determining what is in fact a terrorist act," but he noted that federal court is the best place to settle cases like these for both the plaintiffs and defendants because of discrepancies surrounding what is awarded to the victims of such events based on various state laws. *Id.*

Police Body Camera Footage: It’s Just Evidence

Bridget M. Synan*

I.	INTRODUCTION.....	351
II.	POLICING AND CAMERA TECHNOLOGY.....	353
	A. <i>The Exercise of Discretion</i>	353
	B. <i>The Call for Body-Worn Cameras</i>	355
	C. <i>Lessons Learned from Dashboard Camera</i>	359
III.	THE TENSION BETWEEN PRIVACY AND TRANSPARENCY	365
	A. <i>Privacy Concerns</i>	365
	B. <i>Body-Worn Camera Legislation in Pennsylvania</i>	370
III.	BODY-WORN CAMERA POLICY RECOMMENDATIONS.....	377
IV.	CONCLUSION.....	380

I. INTRODUCTION

Police officers follow a man into a backyard and order him to show his hands. One officer shouts, “gun, gun, gun, gun!” and the officers fire twenty times, killing the man.¹ When officers search for a gun, only a cellphone is found.² A police officer sprints up a staircase where two frantic women hand him an infant, explaining that she is not breathing.³ The police officer quickly begins performing compressions until crying is heard.⁴ Later at a press conference, the child’s family thanks the officer and tells the crowd, “See, sometimes angels don’t come from heaven.”⁵ A police officer pulls up to

* Bridget M. Synan is a 2019 J.D. candidate at Duquesne University School of Law. She graduated summa cum laude from Saint Vincent College in 2016 with a B.A. in English and a second degree in politics. The author would like to thank Professor John Rago for his guidance and support.

1. Jose A. Del Real, *20 Shots in Sacramento: Stephon Clark Killing Reignites a Furor*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/sacramento-stephon-clark.html>.

2. *Id.*

3. *Video Shows Officer React to Choking Newborn*, CNN (Dec. 9, 2017), <https://www.cnn.com/videos/us/2017/12/05/police-bodycam-video-choking-newborn-orig.cnn>.

4. *Id.*

5. *Id.*

a home in the midst of gunfire.⁶ He finds a woman lying in the driveway.⁷ As the woman's husband continues to fire, the officer drags the woman to safety then returns to lead her two children out of the home.⁸ Cell phone video shows a young man running from police fall to the ground as shots ring out.⁹ Cell phone video shows a young man playing basketball with a police officer on his break.¹⁰

Footage of police-citizen encounters, captured by officers and citizens alike, increasingly allows the public to view the range of situations police officers respond to while performing their duties, thus revealing the good, the bad, and the ugly of police work. Body-worn camera footage often elicits strong emotions in the viewer, and in many cases public outcry. Yet, a sharp disconnect exists between public perception of use of force¹¹ incidents and the Constitutional limits of police authority.¹² This disconnect often leads to situations where the public expects an indictment based on a publicly released video, yet a grand jury fails to return one.¹³ In turn, this leads to further pain, confusion, and public outcry.¹⁴

In this article, I will argue that rather than the panacea hoped for, police body cameras are merely an evidence collecting tool. With regards to claims against police officers, body-worn camera footage can be greatly beneficial in determining whether the officer exercised excessive use of force. However, such an evaluation can only properly be made when a jury is presented with *all* of the relevant evidence and instructed on the applicable law. As police departments increasingly outfit their officers with body-worn cameras, the public must come to recognize the limitations of the devices as well as the scope of police power. In order to facilitate this

6. *Cop Rescues Women, Kids From Shooting [Body Cam Footage]*, ABC (July 27, 2016), <https://www.youtube.com/watch?v=lyxsyfwk1Hg>.

7. *Id.*

8. *Id.*

9. Amy B. Wang & Alex Horton, *Officer Who Shot and Killed Antwon Rose is Charged with Criminal Homicide*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/06/27/east-pittsburgh-police-officer-who-shot-and-killed-antwon-rose-charged-with-criminal-homicide/?utm_term=.c49f704e416d.

10. *Basketball 'Mystery Cop' Goes One-On-One with Kid in San Antonio*, HUFFINGTON POST (Mar. 21, 2014, 5:02 AM), https://www.huffingtonpost.com/entry/basketball-mystery-cop_n_5005273.html.

11. "Use of force" is defined as "the amount of effort required by police to compel compliance by an unwilling subject." Philip Bulman, *What Is Use of Force, and What Is a Use-of-Force Continuum?*, NAT'L INST. JUST. (Mar. 3, 2011), <https://www.nij.gov/journals/267/pages/use-of-force-what-is.aspx>.

12. Tracey L. Meares et al., *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 300 (2015).

13. Caren Myers Morrison, *Body Camera Obscura: The Semiotics of Police Video*, 54 AM. CRIM. L. REV. 791, 793 (2017).

14. *See id.*

process, state governments and police departments must shape policy so as to guide police discretion when using the cameras and to ensure that the privacy of those featured in the video is preserved.

Accordingly, Section II discusses policing and camera technology beginning with a focus on police officers' exercise of discretion. Next, Section III describes the initial call to outfit police officers with body-worn cameras following the 2014 unrest in Ferguson, Missouri and the perceived benefits of body-worn cameras in promoting accountability. A comparison will then be drawn between the implementation of body-worn cameras to that of dashboard, or in-car, cameras. I next call into question the overall reliability of video evidence. After that, I discuss the tension between protecting the privacy of individuals featured in body-worn camera footage and the desire of the public for increased police oversight. I will specifically explain the significance of this distinction in the context of domestic violence situations. Finally, Section IV highlights Pennsylvania's approach to a body-worn camera program and recommends that Pennsylvania's legislation serves as a model for other states. This is so because it emphasizes evidence collection and the preservation of the rights of parties seen in body-worn camera footage over public transparency, while still allowing officials to release body-worn camera footage when it is deemed appropriate to do so.

II. POLICING AND CAMERA TECHNOLOGY

A. *The Exercise of Discretion*

The criminal justice system in the United States provides for the exercise of discretion by police and prosecutors.¹⁵ Police officers hold the power to decide "when and how to enforce the law."¹⁶ The classic example of discretion involves speeding drivers.¹⁷ If the speed limit is seventy miles per hour, and the officer clocks a vehicle driving by at seventy-one, or even seventy-five, the officer is unlikely to pull over the motorist even though the motorist clearly broke the law. In contrast, it is much more likely that a police officer will pull over a motorist traveling at eighty-five miles per hour

15. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243-44 (2011).

16. Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 444-45 (1990).

17. George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN ST. L. REV. 1043, 1046 (2005).

or higher. The decision to allow the driver speeding at seventy-five miles per hour to continue traveling, but to pull over and ticket the driver speeding at eighty-five miles per hour falls within a police officer's discretion. Motorists expect the law to be enforced this way. It is not feasible or desirable for the law to be enforced absolutely, thus police officers must be granted discretion:

Given the limitations of law enforcement resources, the need to prioritize policing goals, and the impossibility of legislating every move that a police officer might make, society has little choice but to entrust the police with a certain amount of discretionary authority. Police discretion involves the power to choose between two or more courses of conduct in a particular set of circumstances. Because legislators cannot anticipate the range of situations that police may face, they often draft criminal laws of broad scope, leaving room for police to exercise discretion regarding the enforcement of these laws.¹⁸

As legal scholar Roger A. Fairfax, Jr. explains, "Discretion pervades the American criminal justice system . . . it is essential to the efficient operation of the criminal justice system. Full enforcement of the law would not only be impractical, but also unwise."¹⁹ On the other hand, complete discretion would lead to arbitrary or improper enforcement of the law.²⁰ When a police officer does make an arrest, it next comes within the discretion of the prosecutor to decide whether to charge the offender.²¹ Thus, it is necessary to allow police and prosecutors to exercise a certain level of discretion in order to provide fairness by choosing *not* to enforce the law in certain situations.²² The need for discretion in enforcing the law remains when a police officer dons a body-worn camera. Many advocates of body-worn cameras view the devices as a way to limit police officers' discretion; however, to preserve the rights of citizens, the devices will necessarily require police officers to make another discretion-

18. Reenah L. Kim, Note, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 463-64 (2001); see also Gregory Howard Williams, *Police Discretion: The Institutional Dilemma – Who is in Charge?*, 68 IOWA L. REV. 431, 432 (1983) ("As a practical matter . . . the police could not arrest all violators even if they so desired. Lack of sufficient resources precludes such action. Consequently, the police exercise discretion, and the public expects them to do so").

19. Fairfax, *supra* note 15, at 1243-44.

20. *Id.* at 1250-51.

21. *Id.* at 1244 ("Prosecutors are expected to make decisions regarding which cases *will* be prosecuted out of the many which *could* be prosecuted.").

22. *Id.* at 1243-44.

ary decision—when to turn the cameras on and off. Therefore, discretion remains an integral and necessary part of policing in the criminal justice system that body-worn cameras will not and cannot eliminate.²³ Rather, when implementing body-worn cameras, police departments should focus on defining parameters for the exercise of discretion as it applies to using the devices.

B. The Call for Body-Worn Cameras

Following the unrest in Ferguson, Missouri in 2014, the notion of equipping officers with body-worn cameras emerged as a policy suggestion.²⁴ On August 9, 2014, white police officer Darren Wilson fatally shot Michael Brown, an unarmed African-American teenager.²⁵ The shooting led to weeks of protests and rioting, which police responded to forcefully.²⁶ Without a clear picture of what transpired between Wilson and Brown, commenters began to suggest that “[i]f Ferguson officers had such [body-worn] cameras . . . we would know whether the Brown shooting was justified, and we would know whether Ferguson police overreacted to peaceful, constitutionally protected demonstrations or whether members of the public were engaged in violent rioting warranting forceful police response.”²⁷ In other words, commenters felt video documentation of the incident would not only reveal whether the shooting itself was justified, but whether public and police response in the aftermath of the shooting was justified as well. Ultimately, supporters began to promote body cameras as a comprehensive solution, which could prevent “another Ferguson.”²⁸

The call to equip police officers with body-worn cameras received support from a variety of stakeholders, including police chiefs, the American Civil Liberties Union,²⁹ and President Barack Obama.³⁰ Some polls found nearly ninety percent of Americans, including both Democrats and Republicans, supported the movement to equip

23. See generally Thomas, *supra* note 17, at 1043 (“Discretion in enforcement and prosecution of crime is inevitable; it can be restrained at the margin but it cannot be eliminated.”).

24. Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 832 (2015).

25. *Id.* at 831; see also, e.g., Josh Voorhees, *Everything That’s Going Wrong in Ferguson*, SLATE (Nov. 25, 2014, 2:48 PM), <https://slate.com/news-and-politics/2014/11/ferguson-police-mistakes-documenting-the-police-response-to-the-latest-round-of-michael-brown-protests.html>.

26. Wasserman, *supra* note 24, at 831.

27. *Id.* at 832.

28. *Id.* at 833.

29. Morrison, *supra* note 13, at 791-92.

30. Nedra Pickler, *Obama Proposes Body-Worn Cameras for Police*, PBS (Dec. 1, 2014, 3:05 PM), <https://www.pbs.org/newshour/nation/obama-proposes-body-worn-cameras-police>.

police officers with body-worn cameras.³¹ In May 2015, the Justice Department announced a twenty million dollar grant for a body-worn camera pilot program.³² As of February 2018, five states require at least some officers to wear body cameras.³³ Body-worn cameras offer a plethora of potential benefits to both police officers and citizens by creating a reviewable record, providing a civilizing effect, and aiding in the collection of evidence.³⁴

Many proponents of body-worn cameras, including those within law enforcement, consider accountability as the primary benefit of body-worn cameras.³⁵ If an incident occurs while a police officer is wearing a body camera, and the camera is turned on, then a reviewable record exists that can be used to evaluate the officer's actions. Given the proliferation of cell phone cameras, bystanders will often record encounters between police officers and citizens.³⁶ By wearing a camera, the officer can show his or her view of the incident.³⁷ As Deputy Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice, Roy L. Austin, Jr. explains, "Some police departments are doing themselves a disservice by not using body-worn cameras. Everyone around you is going to have a camera, and so everyone else is going to be able to tell the story better than you if you don't have these cameras."³⁸ Thus, body-worn

31. German Lopez, *The Failure of Police Body Cameras*, VOX (July 21, 2017, 10:00 AM), <https://www.vox.com/policy-and-politics/2017/7/21/15983842/police-body-cameras-failures>; Peter Moore, *Overwhelming Support for Police Body Cameras*, YOUTUBE (May 7, 2015, 3:21 PM), <https://today.yougov.com/news/2015/05/07/body-cams/>.

32. *Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program*, U.S. DEPT. JUST. (May 1, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program>.

33. *Body Worn Camera Laws Database: Requirements to Wear Body Cameras*, NAT'L CONF. ST. LEGISLATURES (Feb. 28, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#. "South Carolina's law requires, contingent on state funding, that every police department implement a body camera program. In Nevada and California, their laws require certain members of their state highway patrol to wear body cameras. Connecticut's law requires their division of state police and special police forces, as well as, municipal police officers receiving grant funds to wear body cameras while interacting with the public." *Id.*

34. See generally LINDSAY MILLER ET AL., OFFICE CMTY. ORIENTED POLICING SERVS., U.S. DEPT. JUSTICE, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 9 (2014).

35. See, e.g., Chris Dunn & Donna Lieberman, *Body Cameras are Key for Police Accountability. We Can't Let Them Erode Privacy Rights*, WASH. POST (June 1, 2017), https://www.washingtonpost.com/posteverything/wp/2017/06/01/bodycams-are-key-for-police-accountability-we-cant-let-them-erode-privacy-rights/?utm_term=.470702e008bf ("Video's power to improve policing lies in the fact it makes us all eyewitness to police-civilian interactions"); Maya Wiley, *Body Cameras Help Everyone — Including the Police*, TIME (May 9, 2017), <http://time.com/4771417/jordan-edwards-body-cameras-police>.

36. MILLER ET AL., *supra* note 34, at 1.

37. *Id.*

38. *Id.* at 9.

cameras provide officers with a way to document their view of an encounter, which is the pertinent view if a complaint later arises.³⁹

On the front end, footage can be an especially useful tool for providing scenario-based training to new officers.⁴⁰ Later, departments can use footage to evaluate performance as new officers enter the field.⁴¹ Reviewing body-worn camera footage enables police departments to identify both structural and individual issues regarding officer conduct.⁴² Departments can then provide officers with training to correct questionable behavior before it escalates, or terminate officers if necessary.⁴³ When addressing department-wide claims, such as racial-profiling, body camera footage can provide a record of whether profiling occurred and the frequency of such incidents, and can show whether any patterns of behavior exist.⁴⁴

Use of body-worn cameras demonstrably reduces use of force complaints, and in many cases the footage exonerates the officer.⁴⁵ A 2012 study of the Rialto, California Police Department found a 60% reduction in use of force incidents after officers began wearing cameras.⁴⁶ The study randomly assigned body-worn cameras to police officers, and found “shifts without cameras experienced twice as many use of force incidents as shifts with cameras.”⁴⁷ Likewise, a 2012 study conducted in Mesa, Arizona found officers that did not wear body-cameras received “almost three times as many complaints as the officers who wore the cameras.”⁴⁸ The Chief of Police of Rialto, William Farrar, surmised that the reduction in complaints likely occurred because both officers and citizens behaved better knowing their actions were being filmed.⁴⁹ In other words, the body cameras provided a civilizing effect. Decades of research demonstrating the presence of cameras, other people, or “even just a picture of eyes,” support Chief Farrar’s observation.⁵⁰

Mere awareness of being watched tends “to nudge us toward civility: [w]e become more likely to give to charity, for example, and

39. *Graham v. Connor*, 490 U.S. 386, 395 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . .”).

40. MILLER ET AL., *supra* note 34, at 7.

41. *Id.*

42. *Id.* at 7-8.

43. *Id.*

44. *Id.* at 8.

45. *Id.* at 6-7.

46. *Id.* at 5.

47. *Id.*

48. *Id.* at 6.

49. *Id.* at 5.

50. Amanda Ripley, *A Big Test of Police Body Cameras Defies Expectations*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/upshot/a-big-test-of-police-body-cameras-defies-expectations.html>.

less likely to speed, steal or take more than our fair share of candy.”⁵¹ However, a more recent study conducted in Washington, D.C. showed no difference in the number of use of force incidents between officers with and without body cameras.⁵² Explanations for the surprising findings of the study, which contradicts the popularly held notion that cameras do provide a civilizing effect, include: (1) the possibility police officers became accustomed to the cameras and hence desensitized to them; (2) “officers without cameras were acting like officers *with* cameras, simply because they knew other officers had the devices”; (3) in high-stress encounters officers did not remember to activate their cameras; or (4) the cameras were less effective in Washington, D.C. than in other cities because the department already addressed excessive use of force problems in the late 1990s.⁵³

When determining whether an officer used excessive force,⁵⁴ courts use the Fourth Amendment reasonableness standard.⁵⁵ The inquiry is an objective one that accounts for “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”⁵⁶ In *Graham v. Connor*, the United States Supreme Court further notes, “[n]ot every push or shove”⁵⁷ constitutes a Fourth Amendment violation; rather, “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁵⁸ Consequently, use of force cases are inherently fact dependent.⁵⁹

51. *Id.*

52. *Id.*

53. *Id.*

54. “Excessive force” is defined as “[m]uch more force than is required to achieve a lawful goal.” Stephen Michael Sheppard, *Excessive Force*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012). The Pittsburgh Bureau of Police defines excessive force as “the use of force which exceeds the level that a reasonable officer might reasonably believe, at the time of the incident, is necessary under the circumstances of a particular incident.” PITTSBURGH BUREAU OF POLICE, USE OF FORCE 2 (May 19, 2015), http://apps.pittsburghpa.gov/redtail/images/1147_12-06_Use_of_Force.pdf.

55. *Scott v. Harris*, 550 U.S. 372, 382-83 (2007); *Graham v. Connor*, 490 U.S. 386, 395 (1989).

56. *Graham*, 490 U.S. at 396.

57. *Id.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

58. *Id.* at 396-97.

59. *Scott*, 550 U.S. at 383 (stating “we must still slosh our way through the factbound morass of ‘reasonableness’”).

Proponents of body-worn cameras believe video will resolve factual disputes between a police officer and a suspect's version of events by providing an objective account of the incident.⁶⁰ The reasonableness standard under the Fourth Amendment, however, diverges from what most people consider acceptable behavior.⁶¹ Studies show a wide disparity in what the public considers legitimate police conduct and what police conduct is constitutionally permissible.⁶² For example, pursuant to department policy in Pittsburgh, a police officer may use a level of force that exceeds that used by the suspect.⁶³ Most police departments have established a use of force continuum describing a series of escalating actions an officer may take.⁶⁴ Hence, video that clearly seems to show excessive force when viewed by the public will oftentimes fail to lead to an indictment when presented to a grand jury that has taken into account the circumstances leading up to the incident.⁶⁵ Moreover, video is subject to the bias of the factfinder.⁶⁶

C. *Lessons Learned from Dashboard Camera*

The policy arguments over body-worn cameras are not unfamiliar. Two decades ago, police departments and activists similarly debated the costs and benefits of another type of video surveillance: in-car dashboard cameras.⁶⁷ Initially, dashboard cameras were intended to aid in the prosecution of drunk drivers.⁶⁸ In fact, insurance companies funded the first wave of dashboard cameras in the 1980s.⁶⁹ These companies sought to reduce the medical bills accompanying drunk driving incidents by increasing enforcement and penalties imposed against drunk drivers.⁷⁰ The then recently

60. Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985, 992 (2016).

61. Morrison, *supra* note 13, at 792-93.

62. *Id.* at 793; *see also* Meares et al., *supra* note 12, at 300.

63. *See, e.g.*, PITTSBURGH BUREAU OF POLICE, *supra* note 54, at 2 ("To gain control in a physical confrontation, an officer may be required to use a force option which exceeds the level of force employed by the subject, and an officer may do so, so long as the force option utilized is reasonable under the circumstances.").

64. *The Use-of-Force Continuum*, NAT'L INST. JUST. (Aug. 4, 2009), <https://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/Pages/continuum.aspx>.

65. Morrison, *supra* note 13, at 792-93.

66. *Id.* at 796.

67. Robinson Meyer, *Seen It All Before: 10 Predictions About Police Body Cameras*, ATLANTIC (Dec. 5, 2014), <https://www.theatlantic.com/technology/archive/2014/12/seen-it-all-before-10-predictions-about-police-body-cameras/383456/>.

68. *Id.*

69. *Id.*

70. *Id.*

formed organization, Mothers Against Drunk Driving, also provided funds.⁷¹ Later, in the 1990s, the Drug Enforcement Administration provided additional support for the purchase of cameras in order to document whether a suspect gave consent to a vehicle search, which is important evidence in the prosecution of drug traffickers.⁷² Later on, activists began to view dashboard cameras as a way to document and prevent racial profiling.⁷³ In the late 1990s and early 2000s, advocates argued dashboard cameras could prevent racial profiling by making officers aware their actions were being recorded.⁷⁴

After initial skepticism, law enforcement agencies also came to support use of dashboard cameras.⁷⁵ With increased support came more funding, and between 2000 and 2004, the Department of Justice gave twenty-one million dollars in grants to state and local agencies for the purchase of dashboard cameras.⁷⁶ Ultimately, the grants outfitted police cruisers in forty-nine states and Washington, D.C. with dashboard cameras.⁷⁷ A study published by the International Association of Chiefs of Police ("IACP") in 2004, funded by the Department of Justice's Office of Community Oriented Policing Services ("COPS"), evaluated the use and impact of dashboard camera for forty-seven state agencies that received in-car camera grants.⁷⁸ The study surveyed the agencies as well as prosecutors and the public.⁷⁹ The study identified many of the same benefits and concerns for implementing dashboard camera that analyses of body-worn cameras discuss today. The survey found that in-car camera reduced complaints regarding officer professionalism and courtesy, and typically exonerated officers of any accusations of wrongdoing.⁸⁰ Only 5% of the over 3,000 officers surveyed reported that complaints against them were sustained by video evidence.⁸¹ Dashboard camera improved both officer and citizen behavior.⁸² Officers who reported acting less aggressively when cameras were

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T JUSTICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES FROM THE IACP STUDY ON IN-CAR CAMERAS 1 (William Albright et al. eds., 2005).

79. *Id.* at 7.

80. *Id.* at 15.

81. *Id.*

82. *Id.* at 23.

rolling likewise reported that citizens behaved more courteously.⁸³ This finding confirmed prior research indicating “the demeanor of the police and public are interdependent.”⁸⁴ Furthermore, the study found, “in-car camera enjoys overwhelming public support and can enhance an agency’s image while ensuring integrity and accountability.”⁸⁵

Notably, the majority of officers surveyed regarded the dashboard cameras primarily as a tool for gathering evidence.⁸⁶ In a 1990 article, *New York Times* reporter Andrew Malcom interviewed the heads of several law enforcement agencies regarding dashboard camera.⁸⁷ Franklin County Sheriff’s Department Chief Deputy Michael E. Creamer admitted, “I was skeptical of the cameras at first Now I’d like a camera in all 45 cars.”⁸⁸ Creamer went on to explain how the substantial evidentiary value of the video led to his support for dashboard cameras, pontificating: “We’ll show the judge, the jury and the courtroom how they really looked driving on the wrong side, falling down by their car, unable to walk a straight line or recite the alphabet. It’s very hard to rebut that kind of testimony.”⁸⁹ While dashboard cameras led to a notable increase in prosecutions for driving under the influence in Richmond, Virginia, Captain Thomas Shook of Richmond’s Traffic Safety Division was careful to note, “[t]he cameras are no panacea . . . some of the older guys grumble about the extra gear and new technology. But our guilty pleas are going up each month—and so are . . . our requests for alcohol treatment.”⁹⁰ The sentiments of Creamer and Shook largely echo the initial skepticism with which law enforcement officers viewed body-worn cameras, along with later acceptance that the devices do provide notable benefits, especially in terms of evidence collection and prosecution.

On their part, prosecutors “rated the overall use of [dashboard] video evidence as successful or highly successful.”⁹¹ Prosecutors found dashboard video especially useful in cases involving “driving under the influence, traffic violations, vehicular pursuits, assaults

83. *Id.*

84. *Id.*

85. *Id.* at 29.

86. *Id.* at 16.

87. Andrew H. Malcolm, *Drunken Drivers Now Facing Themselves on Video Camera*, N.Y. TIMES (Apr. 21, 1990), <http://www.nytimes.com/1990/04/21/us/drunken-drivers-now-facing-themselves-on-video-camera.html>.

88. *Id.*

89. *Id.*

90. *Id.*

91. OFFICE OF CMTY. ORIENTED POLICING SERVS., *supra* note 78, at 22.

on officers, narcotics enforcement, domestic violence, and civil litigation against law enforcement agencies.”⁹² The prosecutors surveyed did report concerns regarding the limited field of vision of the cameras and poor audio/video quality.⁹³ The study also noted storage of the video evidence would be one of the biggest obstacles for an agency implementing dashboard cameras to overcome.⁹⁴ These concerns largely echo those mentioned in the debate over body-worn cameras heard today.

Ultimately, the IACP study advised, “the recordings should be treated as any other evidentiary items” because dashboard camera footage can serve as critical evidence in criminal, civil, or administrative matters.⁹⁵ Today’s dashboard cameras may offer even further evidentiary value because modern technological additions can provide information beyond the recording alone.⁹⁶ For example, some dashboard cameras are equipped to mark an area using GPS.⁹⁷ If a suspect is seen throwing an item out of their car during pursuit, the officers can later return to the area to search for weapons or drugs.⁹⁸ Some dashboard cameras can also record when a vehicle brakes, which would be important evidence if the vehicle were in crash.⁹⁹

Perhaps one of the most well-known pieces of dashboard camera evidence is the video the United States Supreme Court relied on in *Scott v. Harris*.¹⁰⁰ In March 2001, police clocked Victor Harris traveling at seventy-three miles per hour in a fifty-five mile per hour speed zone.¹⁰¹ Harris did not pull over when a Georgia County deputy activated his lights; rather, he engaged in a chase down mostly two-lane roads at speeds exceeding eighty-five miles per hour.¹⁰² Deputy Timothy Scott joined the pursuit, becoming the lead car after Harris pulled into a shopping center.¹⁰³ Police nearly boxed Harris in at the shopping center, but he managed to exit the lot and speed away once more.¹⁰⁴ After receiving permission from his supervisor to “take him out,” Scott “applied his push bumper to the

92. *Id.*

93. *Id.* at 21-22.

94. *Id.* at 36.

95. *Id.*

96. Meyer, *supra* note 67.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Scott v. Harris*, 550 U.S. 372 (2007).

101. *Id.* at 374.

102. *Id.* at 374-75.

103. *Id.* at 375.

104. *Id.*

rear” of the vehicle, which caused Harris to lose control.¹⁰⁵ Harris’ vehicle “left the roadway, ran down an embankment, overturned, and crashed.”¹⁰⁶

The severe injuries Harris sustained in the crash left him a quadriplegic.¹⁰⁷ Harris filed suit under 42 U.S.C. § 1983,¹⁰⁸ arguing his Fourth Amendment rights against unreasonable seizure were violated by Scott’s use of deadly force.¹⁰⁹ The United States Court of Appeals for the Eleventh Circuit found Harris “remained in control of his vehicle,” slowing for turns and using his indicators, and did not pose a threat to pedestrians.¹¹⁰ Consequently, the Eleventh Circuit ruled that “a jury could conclude that Scott unreasonably used deadly force to seize Harris by ramming him off the road.”¹¹¹ The case ultimately made it to the United States Supreme Court, which decided the video evidence clearly contradicted Harris’ version of the story, and that the facts should be viewed “in the light depicted by the videotape.”¹¹² Upon watching the video, the Supreme Court declared:

Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury Respondent’s version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction.¹¹³

The majority considered the video irrefutable. The Court even posted the video on its website asserting, “[w]e are happy to allow

105. *Id.*

106. *Id.*

107. *Id.*

108. Section 1983 claims provide “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity.” 42 U.S.C. § 1983.

109. *Scott*, 550 U.S. at 375-76.

110. *Harris v. Coweta Cty.*, 433 F.3d 807, 815-16 (11th Cir. 2005); *see also Scott*, 550 U.S. at 378-79 (writing for the majority Justice Scalia notes, “reading the lower court’s opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test”).

111. *Harris*, 433 F.3d at 821.

112. *Scott*, 550 U.S. at 380-81.

113. *Id.*

the videotape to speak for itself.”¹¹⁴ Justice Stevens, however, saw the tape as confirming the lower court’s view of the facts.¹¹⁵

Justice Stevens believed the other cars seen pulling to the side of the road did so not because Harris forced them off the road, but because of the sirens and lights of the police cars.¹¹⁶ According to Justice Stevens, a reasonable jury could find the motorists were at no greater risk than if a speeding ambulance drove past.¹¹⁷ No pedestrians or residences were visible during the chase, Justice Stevens noted, and at one point Harris even slowed down to wait for cars moving in the other direction to pass.¹¹⁸ Concluding, Stevens emphasized, “[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.”¹¹⁹ Although he was the lone dissenter, “[i]n reporting that he, at least, saw something different, Justice Stevens was plainly advancing the claim that the tape doesn’t speak for itself—that different people, with different experiences, can see different things in it.”¹²⁰

A group of law professors decided to take on the so-called “Scott Challenge” of letting the video “speak for itself” by showing the video to approximately 1,350 individuals.¹²¹ Although the bulk of subjects agreed with the majority’s view of the videotape, “marked differences in perceptions” were identifiable across certain subgroups.¹²² Approximately 75% of participants in the study agreed with the majority, while 25% did not agree that use of deadly force was justified.¹²³ African Americans were significantly more pro-plaintiff, as were lower-income subjects.¹²⁴ “[B]eing African American (as opposed to white)” had the largest effect on response measures.¹²⁵

The test showed life experience influences perception of a supposedly completely objective video and can lead reasonable people to disparate conclusions.¹²⁶ The study found “[d]ifferences in means

114. *Id.* at 378 n.5.

115. *Id.* at 390 (Stevens, J., dissenting).

116. *Id.* at 390-91.

117. *Id.*

118. *Id.* at 392-93.

119. *Id.* at 396.

120. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 848 (2009).

121. *Id.* at 848, 854.

122. *Id.* at 864.

123. *Id.* at 866.

124. *Id.* at 867.

125. *Id.*

126. *See generally id.*

show that characteristics like race, gender, income, party affiliation, ideology, region of residence, and cultural orientation all tend to matter” when viewing the video.¹²⁷ The study identified two distinct cultural styles:

Individuals (particularly white males) who hold hierarchical and individualist cultural worldviews, who are politically conservative, who are affluent, and who reside in the West were likely to form significantly more pro-defendant risk perceptions. Individuals who hold egalitarian and communitarian views, whose politics are liberal, who are well educated but likely less affluent, and whose ranks include disproportionately more African Americans and women, in contrast, were significantly more likely to form pro-plaintiff views and to reject the conclusion that the police acted reasonably in using deadly force to terminate the chase.¹²⁸

Consequently, the Court’s decision in *Scott v. Harris* can only be justified if the group of people who see the video differently from the majority are unreasonable.¹²⁹ The divergent reactions to a seemingly straightforward piece of evidence demonstrate that video is not necessarily a silent and impartial witness. Rather, the meaning one derives from watching video evidence is greatly impacted by one’s own views and experiences.¹³⁰

III. THE TENSION BETWEEN PRIVACY AND TRANSPARENCY

A. *Privacy Concerns*

Privacy is a major concern when implementing a body-worn camera program. When wearing a body camera, a police officer may encounter suspects, victims, and bystanders in a variety of stressful and extreme circumstances.¹³¹ The need to protect the privacy of individual citizens clearly stands in tension with the desire for increased transparency.¹³² Footage will often depict citizens who may not want their images widely shared; especially if police captured

127. *Id.* at 870.

128. *Id.* at 879.

129. *Id.* at 880-81.

130. Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 947-48 (2017).

131. JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 2 (2015).

132. *Developments in the Law – Policing: Chapter Four: Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1808 (2015).

the video during a sensitive situation.¹³³ Video may also serve no legitimate public purpose other than embarrassment.¹³⁴ For example, dashboard camera footage of intoxicated individuals often goes viral, and becomes immortalized online.¹³⁵ Of particular concern is when an officer responds to a domestic violence call at a private residence.¹³⁶ Legal scholar Mary D. Fan posits the following scenario:

You call the police to report stalking by an ex-partner. Officers come to your home to take your statement. You reveal personal details about your relationship, your employment, your nightly fear, how you sought a protection order. All of this information—plus your address and intimate details inside your home—are recorded on police body camera by the responding officers. This video of you ends up posted on YouTube, obtained pursuant to a sweeping public disclosure request for all police body camera video by someone you have never met.¹³⁷

The need to protect privacy in a domestic violence situation is abundantly clear. In many cities, domestic violence calls account for the largest number of emergency calls¹³⁸ and pose great danger to responding officers with “22% of law enforcement officer ‘line of duty’ deaths” between 2010 and 2014 occurring “while responding to a call for service involving a domestic dispute.”¹³⁹ Additionally, prosecutors often find it particularly difficult to try domestic violence cases.¹⁴⁰ Victims habitually fail to cooperate for a variety of

133. STANLEY, *supra* note 131, at 5.

134. *Id.*

135. *Id.*

136. Bryce Clayton Newell, *Collateral Visibility: A Socio-Legal Study of Police Body-Camera Adoption, Privacy, and Public Disclosure in Washington State*, 92 IND. L.J. 1329, 1337 (2017) (“[A]s police officers are outfitted with mobile surveillance devices, such as body-worn cameras, which are not constrained by property or spatial limitations (that is, they can be worn into private residences or anywhere else the officer chooses to be), the tensions between privacy, state surveillance, and public access become increasingly escalated.”).

137. Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 397 (2016).

138. *How Police Are Trained to Respond to Domestic Violence*, DOMESTIC SHELTERS (May 4, 2016), <https://www.domesticshelters.org/domestic-violence-articles-information/how-police-are-trained-to-respond-to-domestic-violence#.WlubXzsddp8>.

139. *Law Enforcement, Justice System and Domestic Violence*, DOMESTIC SHELTERS (Jan. 7, 2015), <https://www.domesticshelters.org/resources/statistics/law-enforcement-and-domestic-violence#.Vq-n7SorLIU>.

140. See, e.g., CAROLYN C. HARTLEY & ROXANN RYAN, NAT’L INST. JUSTICE, PROSECUTION STRATEGIES IN DOMESTIC VIOLENCE FELONIES: TELLING THE STORY OF DOMESTIC VIOLENCE 1 (April 2002); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1860-62 (1996); Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 425-26 (2001).

reasons, such as: fear of retaliation, financial dependence on the abuser, or because the victim yields “to their abusers’ need for power and control.”¹⁴¹ As such, it is imperative for police officers to collect as much evidence as possible when initially responding to a domestic violence call. Thus, if the victim no longer wishes to cooperate in the prosecution, proof remains that can corroborate the initial allegations and sustain the conviction.¹⁴² Hence, in addressing domestic violence, use of body-worn cameras can be greatly beneficial to officers, prosecutors, and victims.

Body-worn camera footage “can provide prosecutors with powerful evidence of the actions and statements of offenders and victims and the scene of the incident, in ways that written descriptions or still photographs cannot equate.”¹⁴³ In fact, in a study conducted in Phoenix, Arizona, researchers found domestic violence cases involving a camera-wearing officer “were more likely to be initiated by the prosecutor’s office (40.9% vs. 34.3%), have charges filed (37.7% vs. 26%), have cases furthered (12.7% vs. 6.2%), result in a guilty plea (4.4% vs. 1.2%), and result in a guilty verdict at trial (4.4% vs. 0.9%).”¹⁴⁴

The benefits of body-worn camera footage in the context of domestic violence are clear; yet, individuals hold a constitutionally recognized right to greater privacy in the home than in public.¹⁴⁵ This is one area where implementation of a body-worn camera program differs from the implementation of dashboard camera. Whereas dashboard camera generally captures content occurring on public roads and highways, body cameras can invade the private sphere. Thus, state legislatures and police departments must carefully craft body camera policies that strike a balance between the need to protect the privacy of individuals, and victims especially, while reaping the benefits of evidence collected by body-worn camera. The need to preserve privacy, though, also stands in tension

141. Farrah Champagne, *Prosecuting Domestic Violence Cases*, AM. B. ASS’N (Sept. 17, 2015), <https://www.americanbar.org/groups/litigation/committees/criminal/articles/2015/fall/2015-0915-prosecuting-domestic-violence-cases/>.

142. Paula Reed Ward, *Why Do some Victims of Domestic Violence Refuse to Testify?*, PITT. POST-GAZETTE (June 23, 2013, 12:00 AM), <https://www.post-gazette.com/local/region/2013/06/23/Why-do-some-victims-of-domestic-violence-refuse-to-testify/stories/201306230145>.

143. SANDRA TIBBETTS MURPHY, BATTERED WOMEN’S JUSTICE PROJECT, POLICE BODY CAMERAS IN DOMESTIC AND SEXUAL ASSAULT INVESTIGATIONS: CONSIDERATIONS AND UNANSWERED QUESTIONS 8 (2015).

144. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T JUSTICE, BODY-WORN CAMERA FREQUENTLY ASKED QUESTIONS 11 (2007), https://www.bja.gov/bwc/pdfs/bwc_faqs.pdf.

145. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *Mapp v. Ohio*, 367 U.S. 643, 647-48 (1961); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

with public desire for increased transparency and the idea that body cameras would facilitate greater citizen oversight of the police.

One way to address privacy concerns is to require a police officer to give notification that he or she is recording via body camera upon entering a private residence. It may not always be feasible, however, to safely give notification based upon the circumstances when police officers arrive. The ACLU therefore recommends police officers give notice except in an emergency situation.¹⁴⁶ Most police departments allow officers the discretion not to record if “doing so would be unsafe, impossible, or impractical.”¹⁴⁷ Departments currently using body-worn cameras employ a variety of notification policies. Some departments require police officers to give notification when recording; some only encourage it, while others do not specify whether or not notification is required.¹⁴⁸ For example, in Los Angeles, notice is “encouraged but not required if officers are legally in the area.”¹⁴⁹ In Minneapolis, notice is “[e]ncouraged in general. If asked, an officer must inform those inquiring that [the] body cam[era] is recording, unless it would be unsafe to do so.”¹⁵⁰ Whereas in Tampa, officers must only give notification when recording victims.¹⁵¹ Meanwhile, in San Antonio officers “are not required to advise citizens they are being recorded or show any citizen a video which they recorded” and officers need not activate or deactivate a body-worn camera based “solely upon the request of a citizen.”¹⁵² Due to the increased privacy concerns when interviewing victims, some departments prefer to give officers discretion in determining whether or not to record these interviews.¹⁵³ The ACLU advises body-worn camera policies should not require continuous recording for the duration of the police officer’s shift, or even during every public encounter.¹⁵⁴ Originally, the ACLU advocated for an all-public-encounters policy; however, it changed its position upon consideration of the importance of protecting the privacy rights of victims and witnesses, especially in states where open-records laws

146. STANLEY, *supra* note 131, at 6.

147. MILLER ET AL., *supra* note 34, at 13.

148. *Police Body Camera Policies: Recording Circumstances*, BRENNAN CTR. FOR JUST. (Aug. 3, 2016), <https://www.brennancenter.org/analysis/police-body-camera-policies-recording-circumstances>.

149. *Id.*

150. *Id.*

151. *Id.*

152. SAN ANTONIO POLICE DEPT. GENERAL MANUAL, PROCEDURE 410 – BODY WORN CAMERAS 2 (2017).

153. See MILLER ET AL., *supra* note 34, at 18.

154. STANLEY, *supra* note 131, at 4.

do not protect access to routine footage.¹⁵⁵ Consequently, the ACLU suggests the decision to record should be within an officer's control; although, the officer's ability to choose which encounters to record should be limited.¹⁵⁶

Recording can also impinge upon the privacy of the officer. The ACLU has acknowledged, "continuous recording might feel as stressful and oppressive in those situations as it would for any employee subject to constant recording by their supervisor."¹⁵⁷ This could create distrust between officers and their supervisors.¹⁵⁸ Many police officers feel concern over adding more scrutiny to an already stressful job.¹⁵⁹ First-level officers in particular feel pressure to "get everything right."¹⁶⁰ The danger also exists that footage could be misused by supervisors to discipline officers for minor violations, particularly in the case of whistleblowers or union activists.¹⁶¹ Moreover, not every action an officer takes during a shift will involve a police-citizen encounter. For example, during a shift, an officer may answer a phone call from a spouse, pick up lunch, or chat with other officers about football, precinct politics, or any number of topics not related to work.

Other initiatives aimed at increasing public trust of police, such as community policing,¹⁶² could suffer if departments required police officers to record all public encounters.¹⁶³ The philosophy of community policing encourages police departments to develop collaborative partnerships with "the individuals and organizations they serve to develop solutions to problems and increase trust in police."¹⁶⁴ In other words, it encourages interaction and communication between officers and members of the community. One facet of achieving this goal involves placing officers on long-term assignments to specific neighborhoods in order to "enhance customer service and facilitate more contact between police and citizens, thus establishing a strong relationship and mutual accountability."¹⁶⁵

155. *Id.*

156. *Id.* at 4.

157. *Id.* at 3.

158. MILLER ET AL., *supra* note 34, at 24.

159. *Id.* at 24-25.

160. *Id.* at 25.

161. STANLEY, *supra* note 131, at 3.

162. Community policing is "a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime." OFFICE CMTY. ORIENTED POLICING SERVS., U.S. DEPT' JUSTICE, COMMUNITY POLICING DEFINED 1 (2012).

163. MILLER ET AL., *supra* note 34, at 12.

164. OFFICE CMTY. ORIENTED POLICING SERVS., *supra* note 162.

165. *Id.* at 7.

Neighborhood placements seek to promote familiarity and comfort between police officers and citizens. Such efforts could suffer if these “routine and casual situations—such as officers on foot or bike patrol who wish to chat with neighborhood residents”—were required to be recorded, because “turning on a video camera could make the encounter seem suspicious and off-putting.”¹⁶⁶ The Chief of Police of Greensboro, North Carolina, Ken Miller, explained:

There are a lot of issues with recording every citizen contact without regard to how cooperative or adversarial it is . . . if people think that they are going to be recorded every time they talk to an officer, regardless of the context, it is going to damage openness and create barriers to important relationships.¹⁶⁷

Body camera footage can capture the wide array of situations a police officer encounters, from chatting with a member of the community while walking the beat to responding to a tense emergency situation in an individual’s home. As discussed above, knowledge that one is being recorded changes human behavior.¹⁶⁸ While this phenomenon creates a civilizing effect that benefits both police officers and citizens in most situations,¹⁶⁹ there are certain encounters where the presence of a camera may cause discomfort and hinder the efforts of police officers to communicate with victims or build trust in the community. As such, the proper use of body-worn cameras necessitates policies which allow police officers to use discretion in determining when and when not to record.

B. Body-Worn Camera Legislation in Pennsylvania

In Pennsylvania, legislators made major changes to state law in order to successfully implement body-worn camera programs in police departments across the state.¹⁷⁰ State Senator Stewart J. Greenleaf originally introduced the legislation, known as Act 22, remarking that “[t]he use of body-worn cameras not only ensures the integrity of convictions by capturing the defendant’s conduct at

166. MILLER ET AL., *supra* note 34, at 12.

167. *Id.* at 13.

168. Ripley, *supra* note 50.

169. MILLER ET AL., *supra* note 34, at 6.

170. John Finnerty, *New Police Body Camera Rules in Pa.*, DAILY ITEM (Sept. 7, 2017), http://www.dailyitem.com/news/local_news/new-police-body-camera-rules-in-pa/article_0ef0953c-7278-5f58-a3e3-8c759e9a55aa.html.

the scene, but the cameras also have ancillary benefits” such as increasing guilty pleas while decreasing suppression hearings, administrative complaints, and civil lawsuits against police officers.¹⁷¹

In order to receive grant funding for a body-worn camera program, police departments in Pennsylvania “must issue a written, publicly accessible policy.”¹⁷² The policy must meet or exceed the recommendations adopted by the Pennsylvania Commission on Crime and Delinquency (“PCCD”), which include: (1) establishing a protocol “related to the implementation, use, maintenance or storage of body worn cameras”; (2) making that protocol “publicly accessible”; and (3) “[e]nsuring that the protocol . . . substantially compl[ies] with applicable recommendations by the Commission.”¹⁷³ For example, the Pennsylvania State Police’s body-worn camera policy outlines the goals of its program, the responsibilities of officers wearing the cameras, rules on when to record, and procedures for reviewing and releasing video.¹⁷⁴ The PCCD further encourages police agencies to develop such policies “in accordance with best practices [and] with input from . . . community stakeholders, such as local victim service providers, community police review boards, and other interested parties.”¹⁷⁵

Initially, the use of body-worn cameras conflicted with Pennsylvania’s wiretap laws, which prohibited recording in private residences without the owner’s consent.¹⁷⁶ Consequently, a police officer faced potential felony charges if he or she entered a private home while wearing a body camera.¹⁷⁷ As mentioned previously, body-worn cameras are especially useful when responding to domestic violence calls due to both the danger posed to police officers and the need to collect evidence.¹⁷⁸ Pennsylvania Senator Greenleaf, recognizing this issue, proposed legislation that would permit officers to record in private residences “because so much of their

171. Memorandum from Stewart J. Greenleaf to Senate (Dec. 12, 2016, 3:39 PM), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20170&cosponId=21330>.

172. PA. COMM’N ON CRIME & DELINQUENCY, BODY-WORN CAMERA (BWC) POLICY RECOMMENDATIONS 1, https://www.pccd.pa.gov/criminaljustice/advisory_boards/Documents/BWC%20Policy%20Recommendations%20Commission%20Approved.pdf.

173. *Id.*

174. *See generally* PA. STATE POLICE, BODY-WORN CAMERA EQUIPMENT 1-16 (2018), <https://www.psp.pa.gov/for%20media/Documents/BWC%20Policy.pdf>.

175. PA. COMM’N ON CRIME & DELINQUENCY, *supra* note 172.

176. Finnerty, *supra* note 170; *see also* 18 PA. CONS. STAT. § 5702 (2018) (“[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.”).

177. *Id.*

178. MURPHY, *supra* note 143, at 8.

work involves responding to incidents taking place inside a residence. Measures can be taken to protect the privacy of the occupants of the residence, and the recordings will enhance any prosecution of wrongdoers inside the residence.”¹⁷⁹

In order to enable the use of body cameras in departments across the state, Pennsylvania legislators eliminated the double consent barrier by excluding communications made to police officers wearing body cameras from Pennsylvania’s Right-to-Know Law, while simultaneously limiting the ability of the public to gain access to such footage.¹⁸⁰ Generally, under Pennsylvania’s Right-to-Know Law, public records are available unless an enumerated exemption applies.¹⁸¹ Act 22 amended the definition of an “oral communication” so as to exclude communications “made in the presence of a law enforcement officer on official duty who is . . . using an [approved] electronic . . . device . . . to intercept the communication in the course of law enforcement duties” from state wiretap law.¹⁸² Additionally, Act 22, “pre-empts the Right-to-Know Law, and establishes procedures for requests for law enforcement audio recordings or video recordings from body cameras.”¹⁸³ As a result, *most* people will not be able to access body camera footage through the state’s Right-to-Know law in order to protect the privacy of individuals appearing in body-worn camera footage.¹⁸⁴ As Pennsylvania State Police Spokesman Ryan Tarkowski clarifies, “[t]his protects the privacy of anyone who might have day-to-day interaction with the police including people reporting crimes, victims, witnesses and bystanders,” though, “[v]ideo will still be available to parties with direct involvement—like a pending court case—and be made public in certain circumstances.”¹⁸⁵ Accordingly, the footage will be easily

179. Memorandum from Stewart J. Greenleaf to Senate, *supra* note 171.

180. *Body Worn Camera Laws Database: Requirements to Wear Body Cameras*, *supra* note 33.

181. *Id.*; see also 65 P.S. § 67.305(a) stating:

A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. The presumption shall not apply if: (1) the record is exempt under section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.

182. 18 PA. CONS. STAT. § 5702.

183. *Body Worn Camera Laws Database: Requirements to Wear Body Cameras*, *supra* note 33.

184. Finnerty, *supra* note 170.

185. *Id.*

accessible to those recorded, or reasonably related to someone recorded,¹⁸⁶ but not to the public at large.¹⁸⁷ While this measure may limit transparency, it ensures individual privacy. As Pennsylvania State Senator Sharif Street, who represents areas of Philadelphia County, explains:

In our effort to shine a light on truth and justice, we must be sensitive to citizens' privacy. We live in an era of instant gratification . . . thanks to social media . . . While it's awakened society to important issues, it should not come at the expense of allowing anyone to put individuals on public display without their consent.¹⁸⁸

While many consider limited access as an important step in protecting privacy, others believe it undermines the potential for body-worn cameras to facilitate greater public oversight of the police.¹⁸⁹ The Pennsylvania ACLU argued that creating a different process for obtaining body camera video “turns the [Right-to-Know] presumption¹⁹⁰ on its head.”¹⁹¹ The ACLU objected to Pennsylvania's legislation, “because it undermines public trust by creating a new, confusing process for getting access to body cam[era] footage.”¹⁹² In addressing the tension between promoting transparency and protecting an individual's constitutional right to privacy, Pennsylvania legislators decided to strike the balance largely in favor of privacy. As use of body-worn camera becomes more common, each state must likewise determine the limitations it will place on the release of footage.

Currently, twenty-three states and the District of Columbia have enacted legislation specifying separate procedures for requesting body-camera footage under open records law and detailing which footage can and cannot be released to the public.¹⁹³ Connecticut, Nevada, North Dakota, Oklahoma, and Texas, *include* body camera

186. The mother of a child that has been recorded, for example.

187. Sharif Street, *Body Camera Law Balances Right to Know vs. Right to Privacy*, PHILA. INQUIRER (July 5, 2017, 8:52 PM), <http://www.philly.com/philly/opinion/commentary/body-camera-law-balances-right-to-know-vs-right-to-privacy-20170706.html>.

188. *Id.*

189. *Id.*

190. See 65 P.S. § 67.305 (creating the presumption that a record in the possession of a Commonwealth or local agency is a public record).

191. Finnerty, *supra* note 170 (quoting Liz Randol, legislative director for the ACLU in Pennsylvania).

192. *Id.*

193. *Body Worn Camera Laws Database: Body-Worn Camera Data and Open Record Laws*, NAT'L CONF. ST. LEGISLATURES (Feb. 28, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#.

footage as a public record; however, these policies provide exceptions that allow police to deny access to the video—or otherwise redact or obscure the footage—in certain situations.¹⁹⁴ For example, Connecticut law prohibits the disclosure of a “communication between police officers and undercover officers or informants, any medical or psychological treatment and victims of domestic or sexual abuse, homicide, suicide or accidental death.”¹⁹⁵ Under Texas law, only footage used or potentially used as evidence in a criminal proceeding is subject to the open records law; however, footage taken in a private space or of an incident that constitutes a misdemeanor not resulting in arrest may not be released.¹⁹⁶ Conversely, Florida, Georgia, Illinois, Oregon, and South Carolina *exclude* body-worn camera footage from open records laws; yet these states provide exceptions that allow the public to access video in certain situations.¹⁹⁷ Georgia law allows access to “those who believe the video would be relevant to a pending criminal case or civil action.”¹⁹⁸ In Florida and South Carolina, persons who are the subject of a body camera recording may request the video.¹⁹⁹ In Oregon body camera footage may be released if it serves the public interest.²⁰⁰

The approach taken by Pennsylvania and other states that have established separate procedures for obtaining body camera footage outside open records law is preferable to the patchwork of inclusions and exclusions other states have carved out to address privacy concerns. By either excluding certain footage from open records law while providing for exceptions to enable access or by including body camera footage under open records laws while providing exceptions that deny access, these states create potential for confusion as to what footage citizens may access. While crafting a different process for obtaining body camera footage may seem counterintuitive to the Right-to-Know presumption,²⁰¹ body camera footage presents a markedly greater potential to intrude upon the privacy of individuals than records²⁰² conventionally thought of as accessible under open records law requests.

194. *Id.*

195. *Id.*; see also CONN. GEN. STAT. ANN. § 1-210(b)(3) (2018).

196. *Body Worn Camera Laws Database: Body-Worn Camera Data and Open Record Laws*, *supra* note 193; TEX. OCC. CODE ANN. § 1701.661(f) (2017).

197. *Body Worn Camera Laws Database: Body-Worn Camera Data and Open Record Laws*, *supra* note 193.

198. *Id.*

199. *Id.*

200. *Id.*

201. See Finnerty, *supra* note 170.

202. Under 65 P.S. § 67.102, a record is defined as:

While under Pennsylvania law a record includes a film or sound recording that documents the activity of an agency, and body-worn camera footage made by a police agency fits squarely within this description, the extent to which police would begin recording their activity could not have been envisioned when the latest version of the Right-to-Know Law went into full effect in 2009.²⁰³ For example, in a guide to the open records law, the ACLU of Pennsylvania lists agency meeting minutes, the salaries of public officials, communications between lobbyists and legislators, internal email, and 911 time response logs as examples of the type of records available to the public under the state's Right-to Know law.²⁰⁴ Hence, those participating in the creation of such records would have been at least marginally aware of the public nature of the documents at the time of their creation. For example, when running for office, a legislator knows he or she will be subject to public scrutiny; or, when placing a call to 911 citizens use a public service. As such there is a decreased expectation of privacy. In contrast, citizens may not know whether a police officer's body-worn camera is turned on and recording their actions. Furthermore, footage taken on body cameras is far likelier to capture people in compromising, emotional, or intimate settings as compared to the mere release of email or a 911 time log.²⁰⁵ Thus, while body camera footage may technically fit within open records law because it is created by a government agency, there is elevated potential that such footage will infringe upon the privacy rights of individuals who do not expect that records of their activity will be available and subject to public scrutiny. Consequently, access to body camera footage should not be openly obtainable through open records law and creating a separate procedure to protect the rights and privacy of those involved is fitting and proper.

Citizens seeking to obtain footage in the possession of a Pennsylvania police agency must submit a detailed request²⁰⁶ to that

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

203. 65 P.S. § 67.3104.

204. AM. CIV. LIBERTIES UNION PA., A GUIDE TO OPEN RECORDS LAWS IN PENNSYLVANIA (n.d.), https://www.aclupa.org/files/1013/7960/5287/Open_Records_Pamphlet_9-13.pdf.

205. See, e.g., Fan, *supra* note 137.

206. The request must include "[t]he date, time and location of the event recorded," "[a] statement describing the requester's relationship to the event recorded," and "[i]f the recorded incident took place inside a residence, the request must also identify every person pre-

agency's open records officer or "if the agency has a memorandum of understanding with either a District Attorney's Office or the Attorney General's Office, an attorney from one of those offices may review the request and decide if the recording will be released."²⁰⁷ For example, release of video recorded by the Pennsylvania State Police is "coordinated with the applicable district attorney's office."²⁰⁸ In order to comply with ethical rules governing prosecutors, "[t]he public release of body-worn camera recordings in active criminal prosecutions is limited . . . in order to avoid potentially tainting the jury pool or violating other rights of a criminal defendant . . . [and] to avoid possible problems in ensuring a fair trial."²⁰⁹ Consequently, if the requested recording contains "[p]otential evidence in a criminal matter; or" "[i]nformation pertaining to an investigation or a matter in which a criminal charge has been filed; or" "[c]onfidential information or victim information; and" "[t]he reasonable redaction of the recording would not safeguard potential evidence," the request may properly be denied.²¹⁰ If denied, the requester may then appeal to "the Court of Common pleas with jurisdiction over the matter."²¹¹ A police agency or prosecuting attorney, however, may release such footage "with or without a written request."²¹² This allows police departments and district attorneys to act "proactively when there's a case of public interest" as Pennsylvania's Office of Open Records Executive Director Erik Arneson explains.²¹³ Arneson further notes that significant portions of the Act 22 legislation track Right to Know Law hence minimizing confusion and providing for transparency.²¹⁴ Ultimately, Arneson believes that if used properly body cameras "can be a benefit to both police and the public."²¹⁵

sent at the time of the recording, unless unknown and not reasonably ascertainable." *Requesting Audio/Video Recordings from the PA State Police*, PA. ST. POLICE, <https://www.psp.pa.gov/contact/Pages/REQUESTING-AUDIO-AND-VIDEO-RECORDINGS-FROM-THE-PENNSYLVANIA-STATE-POLICE.aspx> (last visited Feb. 15, 2019).

207. *Requesting Police Recordings*, OFF. OPEN RECORDS, <https://www.openrecords.pa.gov/RTKL/PoliceRecordings.cfm> (last visited Feb. 15, 2019).

208. PA. STATE POLICE, *supra* note 174, at 16.

209. *Pennsylvania District Attorneys Issue Best Practices on Body-Worn Cameras*, PA. DISTRICT ATT'YS ASS'N (May 23, 2018), <https://www.pdaa.org/pennsylvania-district-attorneys-issue-best-practices-on-body-worn-cameras/>.

210. *Requesting Police Recordings*, *supra* note 207.

211. *Id.*

212. *Id.*

213. Christian Menno, *Bucks, Montco Police Focus on the Pros, Cons of Body Cameras*, BUCKS COUNTY COURIER TIMES (Aug. 10, 2018, 4:51 PM), <https://www.buckscountycouriertimes.com/news/20180810/bucks-montco-police-focus-on-pros-cons-of-body-cameras>.

214. *Id.*

215. *Id.*

III. BODY-WORN CAMERA POLICY RECOMMENDATIONS

Body-worn cameras will not provide a sea change in police-citizen relations. The devices can certainly improve the criminal justice system; however, this must be done within its existing framework. When implementing a body-worn camera program, departments should focus on using the cameras as a means of collecting evidence. While body-worn camera footage can be greatly beneficial in determining what occurred during an encounter, video evidence of any type is not without its flaws and hence should be primarily utilized in a courtroom where the factfinder is properly instructed on the applicable law and may receive additional evidence regarding the surrounding circumstances at play when the video was made. Additionally, public access to all body camera footage greatly threatens the privacy interests of parties—police officers, victims, suspects, and bystanders—recorded in the video. Hence, when implementing a body-worn camera program the interests of the parties involved should be placed before any public interest in viewing the footage. The approach used in Pennsylvania provides a model for body-worn camera policy because it emphasizes the collection of evidence and the protection of parties featured in body-worn camera footage while still enabling police and prosecutors to release video when it is determined to be appropriate to do so.

The standard by which excessive use of force claims are evaluated diverges from what most people consider acceptable police behavior.²¹⁶ The creation of a record of police action is undeniably valuable in addressing excessive use of force claims; however, the reasonableness standard is a permissible one, which allows for police to exercise discretion.²¹⁷ It takes into consideration the split-second decisions police officers must make. Importantly, the determination is made from the viewpoint of a reasonable officer on the scene, not from the viewpoint of the suspect or that of a reasonably prudent person.²¹⁸ When body-worn camera video is released to the public, it will likely be interpreted under an improper standard thus generating disapproval of the police where perhaps the action was, in fact, legally permissible. Certainly, body-worn cameras will record both justified and unjustified uses of force; however, without the proper instruction and the presentation of other relevant evidence the public cannot accurately determine whether police acted outside the scope of their authority.

216. Meares et al., *supra* note 12, at 300.

217. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

218. *Id.*

As human beings, we inherently understand the need to make discretionary and split-second judgment calls, such as when driving a vehicle. Even in the very operation of body-worn cameras, it has been recognized that police officers must retain discretion to determine when to turn the devices on and off in order to protect the privacy rights of victims in sensitive situations. In other words, a police officer will always be required to exercise discretion in performing his or her job whether or not the officer's actions are recorded. Consequently, the desire for increased accountability and transparency cannot come at the expense of discretion. Rather, the focus should be on defining the acceptable level of deviance from stated parameters and training officers to adhere to promulgated body camera policies. For example, a police department might list encounters during which it expects officers to record, such as traffic stops, arrests, searches, and foot pursuits.²¹⁹ However, given the rapidly evolving circumstances of police-citizen encounters, these rules likely will not be followed absolutely. For instance, an officer may neglect to turn on the camera if he or she suddenly and unexpectedly becomes involved in a foot pursuit. Where such an incident occurs, rather than objectively punishing officers for failure to record, supervisors should ask the officer to give a justifiable reason for failing to record thereby channeling discretion rather than eliminating it.

Notably, the Minneapolis Police Department took steps to provide increased public accountability by providing both raw footage and a "stabilized" video of the officer involved shooting of Thurman Blevins.²²⁰ No charges were filed against the officers because, as determined by the Hennepin County Attorney, Blevins presented a danger to the officers and the community.²²¹ The "stabilized" video includes footage from the body cameras of each of the officers involved, as well as a red circle indicating the gun on Blevins' person.²²² While the addition of the circle may shape "the perspective of the person . . . watching,"²²³ the view of an officer on scene is the relevant perspective when making a legal determination as to the

219. *Police Body Camera Policies: Recording Circumstances*, *supra* note 147.

220. Mara H. Gottfried, *What Do You See When You Watch the Police Shooting of Thurman Blevins Video? We Asked Experts What They Noticed*, PIONEER PRESS (Aug. 1, 2018, 11:17 AM), <https://www.twincities.com/2018/07/31/thurman-blevins-video-shooting-minneapolis-experts-legal-use-of-force/>.

221. *Id.*; see also Kelly Busche, *County Attorney Announces No Charges in Fatal Shooting of Thurman Blevins*, PIONEER PRESS (July 31, 2018, 8:47 AM), <https://www.twincities.com/2018/07/30/hennepin-county-attorney-mike-freeman-statement-fatal-police-shooting-video-thurman-blevins-minneapolis/>.

222. Gottfried, *supra* note 220.

223. *Id.*

reasonableness of the use of force.²²⁴ Moving forward, more departments may consider the approach taken by Minneapolis because it not only provides transparency by showing *what* happened but further serves to educate the public by attempting to illustrate *why* the incident occurred and *why* the charges were dropped.

Over time, as more footage becomes available for review, the footage should be used to provide training and to identify how far discretion can go before it exceeds the scope of the officer's authority. Where actions deviate, those actions must be considered in a court of law. Holding police officers accountable to the communities they serve ultimately lies in presenting evidence to a jury of their peers rather than the court of public opinion. Body-worn camera footage will provide especially valuable evidence of police-citizen encounters; however, footage is only one potential piece of evidence that can be presented at trial. Often, the footage will not include critical events leading up to the incident. Also, the footage only shows one perspective or angle of the encounter and video evidence remains subject to the individual biases of jury members. During an excessive use of force case, additional witnesses may help fill in the gaps the general public does not see in footage shared in the media. Moreover, the jury will receive instruction on the applicable law the general public will lack. Thus, while body camera footage will undoubtedly aid a jury in reaching its decision, it is but one piece of evidence amongst all the other testimony, physical evidence, and overall impression that our criminal justice system asks a jury to evaluate in making its decision.

The implementation of dashboard camera video illustrates that the use of body-worn cameras will likewise serve primarily evidentiary purposes. While activists in the 1990s and early 2000s viewed the installation of dashboard cameras as a way to track and prevent instances of racial profiling, dashboard video has failed to do so.²²⁵ Rather, dashboard camera footage has been most useful in prosecuting drunk driving and drug trafficking cases.²²⁶ Through new technology, the ability to use dashboard camera to gather evidence has only increased. Rather than expanding as a model in preventing racism from entering into police practices, the devices' capabilities for evidence collection grew. A similar process will likely occur with body-worn cameras. Thus, police departments must continue to seek other solutions to repair damaged relations with the community and improve public perception.

224. See *Graham v. Connor*, 490 U.S. 386, 395 (1989).

225. Meyer, *supra* note 67.

226. OFFICE OF CMTY. ORIENTED POLICING SERVS., *supra* note 78, at 22.

Legislation enacted in Pennsylvania properly emphasizes body-worn cameras as an evidence collection tool and protects the privacy interest of parties involved.²²⁷ By enabling officers to wear body cameras into private residences, the Pennsylvania General Assembly greatly expanded police officers' ability to capture and collect evidence. The increased ability to record, though, simultaneously increases the potential for infringement upon the privacy rights of citizens. By amending Right-to-Know law to prevent the public from accessing body-worn camera footage, the Pennsylvania General Assembly properly directed body-worn cameras to function as evidence collection tools. The separate procedure for obtaining body camera footage will ultimately be easier to follow than the hodgepodge of inclusions and exclusions established in other states. Moreover, creating a separate procedure for obtaining body camera footage the Pennsylvania Legislature acknowledges the increased sensitivity of body-worn camera footage as compared to other records available under the Right-to-Know law.

Some body-worn camera proponents believe the Pennsylvania General Assembly defeated the purpose of the devices by limiting release; however, that argument rests on the premise that accountability can only come from public access. The impetus for change, however, comes not from publicly airing video, but from police departments feeling the pressure to use the footage as a tool to identify individual and structural problems within departments, reshape policy, and provide officers with better training.

IV. CONCLUSION

Rather than the panacea hoped for following the unrest in Ferguson, Missouri, it is clear the most useful function of body-worn cameras will be evidentiary. The brief history of video technology in policing shows recordation does not provide a solution to deep-reaching structural problems within police departments. Rather, body-worn cameras are simply a tool. While footage may be used to

227. See generally *Pennsylvania District Attorneys Issue Best Practices on Body-Worn Cameras*, *supra* note 209. See also *id.* for a discussion about this issue from Chester County District Attorney, Tom Hogan:

Pennsylvania legislators worked hard to amend the law to make it possible for the police to deploy body-worn cameras. Now that the law is in place, these best practices provide some simple and common sense guidelines for police to follow in using body cameras to ensure the integrity of prosecutions. . . . the recording in a potential criminal matter must be treated as evidence, preserved and safeguarded. If there are charges in the case, the recording will be turned over as evidence. These and other straightforward rules make the roll-out of body-worn cameras more effective for both law enforcement and the public.

ascertain problematic patterns within police departments or certain corrupt officers, documentation alone is not enough. Police departments must develop and implement further training based on identified issues in order for the effect to be felt in the community.

Within this framework, officer discretion remains necessary. As such, the public must come to understand that whether a police officer's actions were legally justified may not be apparent upon a public viewing of the video with untrained eyes. Legal standards for the proper exercise of police authority differ from what most citizens consider generally acceptable. Consequently, the public must reckon with the fact police officers exercise discretion, and sometimes there will be deviations when exercising that discretion. In turn, police departments must train officers to use discretion properly and within acceptable deviations. Body-worn camera footage can be especially useful in facilitating such training by showing recruits real-life encounters that fall within or without an acceptable use of discretion and by reviewing current officers' actions. These benefits, though, take place over time within the department and do not provide the public the oversight many felt body-worn cameras would offer. Furthermore, the process of properly drafting policies, obtaining, and training officers to use body-worn camera will take time. Thus, police departments must continue to implement other types of outreach, such as community policing, and work to improve relations with the community on a greater scale.

While the public may clamor to view an incident, the privacy rights of parties involved must remain paramount when drafting body-worn camera legislation. Ultimately, body-worn camera footage provides evidence that must be used within the bounds of the criminal justice system. Within this system the enduring value of body-worn camera footage will lie not in sharing it with the general public, but in providing jurors, who represent the community, with valuable evidence. Jurors may then use the footage, along with all of the other evidence presented, to make a carefully considered evaluation based on the applicable law rather than in the court of public opinion where while the outcry may be valid justice cannot properly be done.